No. 05-983 (15)

Title: Jacob Winkelman, a Minor, By and Through His Parents and Legal Guardians, Jeff and Sandee Winkelman, et al., Petitioners

v.

Parma City School District

Docketed: February 6, 2006

Lower Ct: United States Court of Appeals for the Sixth Circuit

Case Nos.: (05-3886)

Decision Date: November 4, 2005

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 1 2005	Application (05A506) for a stay of interlocutory order pending the filing and disposition of a petition for a writ of certiorari, submitted to Justice Stevens.
Dec 1 2005	Response requested by Justice Stevens. (Due by noon, December 2, 2005)
Dec 2 2005	Response to application from respondent Parma City School District filed. (Distributed)
Dec 2 2005	Application (05A506) granted by Justice Stevens of interlocutory order pending the filing and disposition of a petition for a writ of certiorari.
Feb 2 2006	Petition for a writ of certiorari filed. (Response due March 8, 2006)
Feb 17 2006	Order extending time to file response to petition to and including April 7, 2006.
Feb 27 2006	Argued. For petitioner: Jean-Claude Andre, Los Angeles, Cal.; and David B. Salmons, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Pierre H. Bergeron, Cincinnati, Ohio.
Mar 23 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Mar 24 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents.
Mar 30 2006	Supplemental brief of petitioners Jacob Winkelman, a Minor, By and Through His Parents and Legal Guardians, Jeff and Sandee Winkelman, et al. filed.
Apr 6 2006	Brief of respondent Parma City School District in opposition filed.
Apr 7 2006	Brief amici curiae of Autism Society of America, et al. filed.
Apr 7 2006	Brief amici curiae of Council of Parent Attorneys and Advocates, Inc., et al. filed.
Apr 18 2006	DISTRIBUTED for Conference of May 11, 2006.
Apr 18 2006	Letter of April 18, 2006, proposing a lodging received from counsel for petitioners. (Distributed)
Apr 18 2006	Reply of petitioners Jacob Winkelman, a Minor, By and Through His Parents and Legal Guardians, Jeff and Sandee Winkelman, et al. filed. (Distributed)
May 8 2006	Second Supplemental brief of petitioners Jacob Winkelman, a Minor, By and Through His Parents and Legal Guardians, Jeff and Sandee Winkelman, et al. filed. (Distributed)
May 15 2006	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Sep 20 2006	Brief amicus curiae of United States filed.
Oct 4 2006	DISTRIBUTED for Conference of October 27, 2006.
Oct 27 2006	Petition GRANTED.
Nov 9 2006	Consent to the filing of amicus briefs in support of either party received from counsel for

the petitioners.

Nov 17 2006 Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.

Nov 30 2006 Extension of time within which to file petitioner's brief on the merits and the joint appendix to and including December 15, 2006.

Nov 30 2006 Extension of time within which to file respondent's brief on the merits to and including January 23, 2006.

Dec 15 2006 Brief amicus curiae of United States filed.

Dec 15 2006 Joint appendix filed.

Dec 15 2006 Brief of petitioner Jacob Winkelman, a Minor, By and Through His Parents and Legal Guardians, Jeff and Sandee Winkelman, et al. filed.

Dec 15 2006 Brief amici curiae of Council of Parent Attorneys and Advocates, Inc., et al. filed.

Dec 15 2006 Brief amici curiae of Autism Society of America, et al. filed.

Dec 15 2006 Brief amici curiae of Senator Edward M. Kennedy, et al. filed.

Dec 15 2006 Brief amici curiae of Ohio Coalition for the Education of Children with Disabilities, et al. filed.

Dec 15 2006 Brief amici curiae of Equal Justice Foundation, et al. filed.

Dec 18 2006 SET FOR ARGUMENT ON Tuesday, February 27, 2007.

Jan 10 2007 CIRCULATED.

Jan 12 2007 Record received from U.S.C.A. for 6th Circuit.

Jan 17 2007 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Jan 23 2007 Brief amici curiae of National School Boards Association, et al. filed. (Distributed)

Jan 23 2007 Brief amicus curiae of Council of the Great City Schools filed. (Distributed)

Jan 23 2007 Brief of respondent Parma City School District filed. (Distributed)

Jan 26 2007 Letter of counsel for respondent consenting to the request of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument. DISTRIBUTED.

Feb 6 2007 Record received from U.S.D.C. for Northern District of Ohio. (2 boxes)

Feb 16 2007 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Feb 20 2007 Reply of petitioners Jacob Winkelman, a Minor, By and Through His Parents and Legal Guardians, Jeff and Sandee Winkelman, et al. filed. (Distributed)

Supreme Court, U.S.
FILED
05-983 2006
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

JACOB WINKELMAN *et al.*, *Petitioners,*

v.

PARMA CITY SCHOOL DISTRICT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JEAN-CLAUDE ANDRE
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Avenue
Los Angeles, CA 90034
Tel./Fax: (310) 558-0932

QUESTION PRESENTED

The question presented, over which there is a three-way split among six circuits, is:

Whether, and if so, under what circumstances, non-lawyer parents of a disabled child may prosecute an Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 *et seq.*, case *pro se* in federal court.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Jeff Winkelman and Sandee Winkelman are petitioners.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities vi

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provision Involved 2

Statement of the Case 2

A. Statutory Framework 3

B. Factual and Procedural Background 4

Reasons for Granting the Writ 6

I. THE CIRCUITS ARE IRRECONCILABLY DIVIDED OVER WHETHER, AND IF SO, UNDER WHAT CIRCUMSTANCES, NON-LAWYER PARENTS MAY PROSECUTE AN IDEA CASE *PRO SE* IN FEDERAL COURT . 11

II. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE THAT THREATENS THE EFFECTIVE ENFORCEMENT OF THE IDEA 13

TABLE OF CONTENTS-Continued

III. NEITHER THE DECISION BELOW, NOR THE DECISIONS OF THE SECOND, THIRD, SEVENTH, AND ELEVENTH CIRCUITS, CAN BE RECONCILED WITH A PLAIN READING OF THE IDEA'S STATUTORY 17

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED 19

A. The Issue Presented Was Squarely Decided Below, There Are No Impediments to this Court Granting Petitioners the Relief They Seek, and the Circuit Split Over the Issue Is Now Mature and Ripe for this Court's Review 19

B. Supreme Court Rule 11 Should Not Apply Because This Case Is Not a True Case of Certiorari Before Judgment 20

Conclusion 23

TABLE OF CONTENTS-Continued

APPENDIX:

Appendix A
Court of Appeals Order
November 4, 2005 ..... App. 1

Appendix B
District Court Memorandum of Opinion
June 2, 2005 ..... App. 3

TABLE OF AUTHORITIES

Page

CASES:

Am. Constr. Co. v. Jacksonville, Tampa & Key West Ry.
148 U.S. 372 (1893) 22

Barefoot v. Estelle, 463 U.S. 880 (1982) 21

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley 458 U.S. 176 (1982) 3, 4

California v. Am. Stores Co., 492 U.S. 1301 (1989) . 20-21

Cavanaugh v. Cardinal Local Sch. Dist.
409 F.3d 753 (CA6 2005) 9, 11, 13

Collinsgru v. Palmyra Bd. of Educ.
161 F.3d 225 (CA3 1998) 12, 19

C.O. v. Portland Pub. Sch., — F. Supp. 2d —
2005 WL 3507983 (D. Or. Dec. 22, 2005) . 11, 13-14

Deal v. Hamilton County Bd. of Educ.
392 F.3d 840 (CA6 2004) 6-7

Devine v. Indian River County Sch. Bd.
121 F.3d 576 (CA11 1997)
cert. denied, 522 U.S. 1110 (1998) ... 10-11, 12, 20

Estelle v. Gamble, 429 U.S. 97 (1976) 21-22

Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.
423 U.S. 326 (1976) 22

TABLE OF AUTHORITIES-Continued

Page

Hart v. Shelby County Sch. Dist., No. 03-2845 DV
2005 WL 2991480 (W.D. Tenn. Nov. 7, 2005) 14

Land v. Dollar, 330 U.S. 731 (1947) 22

Maroni v. Pemi-Barker Reg'l Sch. Dist.
346 F.3d 247 (CA1 2003) 11, 12-13, 17

Mosley v. Bd. of Educ. of City of Chicago
— F.3d —, 2006 WL 12982 (CA7 Jan. 4, 2006) . 11-12

Navin v. Park Ridge Sch. Dist. 64
270 F.3d 1147 (CA7 2001) 12

Schaffer v. Weast, 126 S. Ct. 528 (2005) 3, 7, 16

Virginia Military Inst. v. United States
508 U.S. 946 (1993) 21

Wenger v. Canastota Cent. Sch. Dist.
146 F.3d 123 (CA2 1998)
cert. denied, 526 U.S. 1025 (1999) 10-11, 12, 20

W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23
960 F.2d 1479 (CA9 1992) 7

TABLE OF AUTHORITIES-Continued

Page

STATUTES AND REGULATIONS:

Individuals with Disabilities in Education Act

20 U.S.C. § 1400 *et seq.* ..... *passim*

20 U.S.C. § 1400(d)(1)(A) 3

20 U.S.C. § 1401(26)(A) 8

20 U.S.C. § 1412(a)(1)(A) 3

20 U.S.C. § 1412(a)(4) 3

20 U.S.C. § 1415(a) 3

20 U.S.C. § 1415(b)(1)(A) 3

20 U.S.C. § 1415(b)(3) 4

20 U.S.C. § 1415(b)(6) 4

20 U.S.C. § 1415(e)(2)(A)(ii) 17-18

20 U.S.C. § 1415(f)(1) 4, 5, 7, 17,18

20 U.S.C. § 1415(g) 18

20 U.S.C. § 1415(h) 4, 10

20 U.S.C. § 1415(i)(2)(A) 2, 4, 12-13, 17, 19

TABLE OF AUTHORITIES-Continued

Page

20 U.S.C. § 1415(k)(6)(A)(i) 17

20 U.S.C. § 1415(m)(1)(B) 18

Sup. Ct. R. 11 20

Fed. R. Evid. 201(b)(2) 14

Ohio Rev. Code § 3323.05 5

34 C.F.R. § 222.50 7-8

34 C.F.R. § 300.511 7

Ohio Admin. Code § 3301-51-08 7

MISCELLANEOUS:

Brief of Petitioners-Appellants, *Russell v. Dep't of Educ., State of Hawaii*, No. 04-15482 (CA9 Jul. 16, 2004) *available at* 2004 WL 1948965 14

Def. Mot. S.J., *Sand v. Milwaukee Pub. Sch.* No. 03-C-1014 (E.D. Wis. Sep. 20, 2005) *available at* 2005 WL 2979427 14

Dept. of Education, Office of Special Education Programs, Data Analysis System, http://www.ideadata.org/tables27th/ar_aa9.htm 15

TABLE OF AUTHORITIES-Continued

Page

Paula L. Hannaford-Agor, *Helping the* Pro Se *Litigant: A Changing Landscape*, 39 Ct. Rev. 8 (2003) 15

James Lindgren & William P. Marshall, *The Supreme Court's Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259 21

Pet. for Cert., *Devine v. Indian River County Sch. Bd.* (No. 97-929) 20

Pet. for Cert., *Wenger v. Canastota Cent. Sch. Dist.* (No. 98-7722) 20

S. Rep. No. 108-185, 108th Cong. 1st Sess. (2003) 11, 16-17

Robert L. Stern et al., Supreme Court Practice (8th ed 2002) 21, 22

David C. Vladeck, *In re Arons: The Plight of the "Unrich" In Obtaining Legal Services*, *in* Legal Ethics: Law Stories 255 (Deborah L. Rhode & David J. Luban eds., 2005) 14-15

Mary Wagner et al., *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002), http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf 15

PETITION FOR A WRIT OF CERTIORARI

Petitioners Jacob Winkelman, by and through his parents, Jeff and Sandee Winkelman; Jeff Winkelman; and Sandee Winkelman respectfully petition for a writ of certiorari to review the interlocutory order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-2a) is unreported. The district court's unreported memorandum of opinion (App., *infra*, 3a-23a) is available at 2005 WL 1315728.

STATEMENT OF JURISDICTION

The district court entered judgment for respondent on June 2, 2005. App., *infra*, 3a-23a. The court of appeals' interlocutory order dismissing petitioner's appeal was entered on November 4, 2005. *Id.* at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1415(i)(2)(A) of the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides:

> Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

STATEMENT

Petitioners Jeff and Sandee Winkelman (the Winkelmans), neither of whom is a lawyer, are the parents of petitioner Jacob Winkelman, a now-eight-year old boy afflicted with autism spectrum disorder. Petitioners brought this action under the IDEA to challenge the appropriateness of the special-education program offered by respondent for Jacob and to vindicate various procedural violations of the IDEA committed by respondent and the Ohio administrative hearing officer who presided over petitioners' administrative-level proceedings. The district court entered judgment for respondent after finding that neither respondent nor the hearing officer violated the IDEA. On appeal, but before any briefing of the merits, the court of appeals dismissed petitioners' appeal because

petitioners were prosecuting their appeal *pro se*. Petitioners seek this Court's review because the court of appeals' decision squarely conflicts with the decisions of five other courts of appeals and wrongly decides an important and recurring issue.

A. Statutory Framework

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities. Under the IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education" (FAPE), which includes special-education and related services necessary to meet the child's particular needs. 20 U.S.C. § 1400(d)(1)(A) & 1412(a)(1)(A). Local school systems are required to develop an individualized education program (IEP) for each child with a disability in accordance with statutory requirements. *See* 20 U.S.C. § 1412(a)(4).

The heart of the IDEA system, however, is the set of procedural safeguards that states and localities are required to accord to "children with disabilities and their parents" in order to ensure the provision of a FAPE. 20 U.S.C. § 1415(a); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982) ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, * * * as it did upon the measurement of the resulting IEP against a substantive standard."). "Parents and guardians play a significant role in the IEP process." *Schaffer v. Weast*, 126 S. Ct. 528, 532 (2005). For example, parents are given access to all relevant records, *see* 20 U.S.C. § 1415(b)(1)(A), and parents must be given full written notice in advance of any change (or refusal to

change) a child's educational services, *see* 20 U.S.C. § 1415(b)(3).

If parents are not satisfied with the IEP offered by their local education agency, they can file a complaint with the State or local educational agency, and they are entitled to "an impartial due process hearing" conducted "by the State educational agency or by the local education agency." 20 U.S.C. § 1415(b)(6) and (f)(1). Among other procedural safeguards at the hearing, parents have the "right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities * * * [and] the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. § 1415(h). "Any party aggrieved" by a decision at the final state administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. § 1415(i)(2)(A).

Ultimately, as this Court stated in *Rowley*, parental involvement is the key to the enforcement of the statutory scheme. "[P]arents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled under the Act," by participating in the formulation of their child's IEP and by undertaking the complaint procedures, beginning with the administrative process and culminating, in appropriate cases, in proceedings in federal court. *Rowley*, 458 U.S. at 182 & n.6, 207, 208-09.

B. Factual and Procedural Background

Beginning in July 2001, Jacob attended preschool at the Achievement Center for Children (ACC) because Jacob did not respond well to respondent's preschool program. App., *infra*, 4a. The Winkelmans and respondent agreed that ACC was an

appropriate placement for Jacob's preschool education for the 2001-02 and 2002-03 school years. *See id.* at 4a.

On June 2, 2003, the Winkelmans and respondent's officials met to discuss Jacob's IEP for the 2003-04 school year – Jacob's kindergarten year. *See id.* at 5a. Respondent proposed an IEP that would educate Jacob in a special education classroom at one of respondent's elementary schools. *See id.* This proposal was not acceptable to the Winkelmans. *See id.* Specifically, the Winkelmans were concerned that the proposed IEP did not contain a specific plan to implement occupational therapy, did not contain a sufficient amount of speech therapy or one-on-one instruction, and did not include music therapy. *See id.*

On June 2, 2003, the Winkelmans filed a request for a due process hearing with respondent's superintendent alleging that the 2003-04 IEP proposed by respondent failed to provide Jacob with a FAPE.[1] *See id.* Meanwhile, the Winkelmans enrolled Jacob at the Monarch School (Monarch), a school that specializes in educating autistic children, where "Jacob performed well" during the 2003-04 school year. *Id.* However, because Monarch's $56,000 annual tuition was prohibitively expensive,[2] the Winkelmans did not enroll Jacob at Monarch

---

[1] The IDEA provides that when parents allege that their local school district has denied their disabled child a FAPE,

> the parents * * * shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

20 U.S.C. § 1415(f)(1); *see also* Ohio Rev. Code § 3323.05(D) & (E).

[2] Jacob's sister, Jenna, also suffers from autism. Due to Mrs. Winkelman's disability and the time required to care for Jenna and Jacob, (continued...)

for the 2004-05 school year and instead educated him at home with supplementation from a one- to two-hour per week outreach program at Monarch. *See id.*

On February 25, 2004, the Impartial Hearing Officer (IHO) selected to preside over the Winkelmans' due process hearing issued a decision finding that respondent provided Jacob with a FAPE. *See id.* at 6a. The Winkelmans appealed to the State Level Review Office (SLRO), which on June 2, 2004, issued a decision affirming the IHO's earlier decision. *See id.* Petitioners were represented by counsel before both the IHO and SLRO.

Dissatisfied with the results of the administrative proceedings, on July 15, 2004, petitioners filed this action in the United States District Court for the Northern District of Ohio challenging the IHO's and SLRO's decisions that respondent had provided Jacob with a FAPE and alleging that respondent and the IHO had violated their procedural rights under the IDEA. *See id.* In total, petitioners alleged three procedural violations and three substantive violations of the IDEA. *See id.* at 7a. Specifically, petitioners alleged that their procedural rights were violated (1) when respondent predetermined to place Jacob in its own program "without meaningful input by Jacob's parents" prior to developing his 2003-04 IEP,[3] Compl. ¶ 21; *see also* Pet. Mot. S.J. at 6-8; App.,

---

[2] (...continued)
the Winkelmans' household income is less than $40,000 per year. They have no savings, face a monthly mortgage payment of $1,300, and incur significant medical expenses for Jacob and Jenna. Because the Winkelmans are unable to afford counsel, *see* Pet. C.A. Opp'n to Mot. to Dismiss 1, we represent petitioners on a *pro bono* basis. Similarly, the attorney who represented petitioners in a related state case, *J.W. v. Ohio Dep't of Educ.*, No. 05-087043 (Cuyahoga County 2005), did so on a *pro bono* basis.

[3] A school district violates the IDEA when it predetermines a child's placement and fails to give parents a "meaningful" opportunity to participate
(continued...)

infra, 10a; (2) when the IHO impermissibly allowed her research assistant to "co-preside" over the proceedings,[4] Compl. ¶ 23; *see also* Pet. Mot. S.J. at 5-6; App., *infra*, 7a; and (3) when the administrative proceedings lasted longer than the forty-five days allowed by the IDEA's implementing regulation,[5] *see* Compl. ¶ 23; Pet. Mot. S.J. at 5-6; App., *infra*, 8a. Petitioners alleged that Jacob's substantive right to a FAPE was denied because the 2003-04 IEP (1) did not contain specific goals and objectives for occupational therapy,[6] *see*

(...continued)
in the formulation of their child's IEP. *See, e.g., Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (CA6 2004) (holding that school district predetermined child's placement and violated parents' right to participate in IEP formulation process where school district refused to discuss parents' suggested alternative placement "even in the face of impressive results"); *see also W.G. v. Bd. of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484-85 (CA9 1992) (holding that school district violated IDEA when it independently developed a proposed IEP that would place the student in a preexisting, predetermined program and refused to consider other alternatives).

[4] The IDEA gives "state authorities * * * limited discretion to determine who conducts [due process] hearings." *Schaffer*, 126 S. Ct. at 532 (citing 20 U.S.C. § 1415(f)(1)). Ohio grants parents the right to participate in the selection of the hearing officer and to know the hearing officer's qualifications. *See* Ohio Admin. Code § 3301-51-08(D)(2) ("The office for exceptional children will send * * * a statement of the qualifications of each hearing officer * * * to both the parent and the district who will have the opportunity to agree upon a hearing officer."); *see also generally id.* § 3301-51-08(E) & (F).

[5] The IDEA's implementing regulations specify that "[t]he public agency shall ensure that not later than 45 days after the receipt of a request for a [due process hearing – (1) A final decision is reached in the hearing." 34 C.F.R. § 300.511(a); *accord*, Ohio Admin. Code § 3301-51-08(G)(3)(b)).

[6] Among other things, an IEP must include "a statement of annual goals, including short-term objectives [and] a statement of the specific educational services to be provided the child." 34 C.F.R. § 222.50. "[O]ccupational
(continued...)

Compl. ¶ 27; Pet. Mot. S.J. at 8-13; App., *infra*, 11a; (2) reduced Jacob's speech therapy from ninety minutes to sixty minutes and did not provide for one-on-one academic instruction,[7] *see* Compl. ¶ 26; Pet. Mot. S.J. at 13-14; App., *infra*, 16a-17a; and (3) did not include music therapy,[8] *see* Compl. ¶ 26; Pet. Mot. S.J. at 14-15; App., *infra*, 21a. On June 2, 2005, the district court granted judgment on the pleadings for respondent, essentially affirming the decisions of the IHO and SLRO. *See* App., *infra*, at 23a. Petitioners timely appealed.

On July 14, 2005, respondent filed a motion to dismiss petitioner's appeal because they were prosecuting the appeal *pro se*. *See id.* at 1a. On November 4, 2005, before any briefing of the merits of the appeal had been conducted, the

---

[6] (...continued)
therapy" is a "related service[]" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. § 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including * * * occupational therapy * * *)" if the requested services are necessary "to assist a child with a disability to benefit from special education").

[7] "Speech-language pathology services" are also "related services" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. § 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including speech-language pathology services * * *)" if the requested services are necessary "to assist a child with a disability to benefit from special education"); *see also supra* note 6. The dispute between the parties over speech therapy and one-on-one instruction concerned whether the sixty minutes of speech therapy offered by respondent and the group instruction used in respondent's special education classroom were each "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; *see also* App., *infra*, 16a-21a.

[8] Although not listed among the IDEA's examples of "related services," music therapy is, nonetheless, a "related service[]" that a school district must provide if necessary "to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A); *see also supra* note 6. The dispute between the parties over music therapy concerned whether Jacob needed music therapy to "receive educational benefits." App., *infra*, 21a-22a.

court of appeals granted the motion and, relying on its prior decision in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756-57 (CA6 2005), dismissed the entire appeal, notwithstanding that petitioners were asserting violations of both Jacob's substantive IDEA rights and the Winkelmans' procedural IDEA rights. *See* App., *infra*, 1a-2a. The court of appeals held, as it had in *Cavanaugh*, that the Winkelmans "are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*." *Id.*; *see also Cavanaugh*, 409 F.3d at 757(recognizing that it was furthering a circuit split and dismissing entire appeal because "any right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to a FAPE"). Rather than make its dismissal order effective immediately upon its issuance, the court of appeals stayed it for thirty days to enable petitioners to attempt to secure counsel. *Id.* at 2a ("[I]n conformity with *Cavanauh* [sic] * * * this appeal is dismissed unless within thirty days of the entry of this order an appearance of counsel is entered in this appeal to represent Jacob.").

On November 16, 2005, petitioners filed a motion with the court of appeals seeking an extension of the thirty-day stay to allow them to petition this Court for certiorari. After the court of appeals denied the motion on December 1, 2005, petitioners sought the same relief through an application to Justice Stevens in his capacity as Circuit Justice for the Sixth Circuit. No. 05A506. On December 2, 2005, Justice Stevens granted the application and stayed the court of appeals' November 4, 2005, order "pending the timely filing and disposition by this Court of a petition for a writ of certiorari." Justice Stevens' order provided that, if certiorari is denied, the "stay will terminate automatically fifteen days after the date of the order denying certiorari," or if certiorari is granted, "upon the sending down of the judgment of this Court."

This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of federal law on which the circuits are avowedly and intractably divided. In the IDEA, Congress expressly provided that non-lawyer parents of a disabled child may prosecute their child's due process hearing *pro se*. *See* 20 U.S.C. § 1415(h) ("Any party to a [due process] hearing * * * shall be accorded – (1) the right to be accompanied and advised by counsel * * * [and] the right to present evidence and confront, cross-examine, and compel the attendance of witnesses"). There is a widely recognized three-way conflict among six circuits, however, over whether a non-lawyer parent's right to prosecute an IDEA dispute *pro se* carries-over to federal court and, if so, to what extent. This question recurs frequently because of the large percentage of parents with disabled children who are unable to obtain or afford a lawyer.

One court of appeals has held that there are no limitations on a parent's ability to prosecute an IDEA case *pro se* in federal court. Four circuits have limited a non-lawyer parent's ability to prosecute an IDEA case *pro se* by holding that counsel is needed to prosecute a child's substantive IDEA claims but not a parent's procedural IDEA claims. One circuit – the Sixth Circuit below here – has gone even further by holding that non-lawyer parents may not prosecute an IDEA case in federal court *pro se* under any circumstances and regardless of the nature of the IDEA claims being asserted. Although this Court declined several years ago to grant certiorari on the question presented, *see Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 123 (CA2 1998), *cert. denied*, 526 U.S. 1025 (1999); *Devine v. Indian River County School Board*, 121 F.3d 576 (CA11 1997), *cert. denied*, 522 U.S. 1110

(1998), this case is a better vehicle for this Court's review than either *Wenger* or *Devine*. *See infra* at 20.

Because only this Court can bring the required uniformity to how IDEA claims are litigated in federal court, and because the decision below is erroneous, certiorari should be granted.

I. THE CIRCUITS ARE IRRECONCILABLY DIVIDED OVER WHETHER, AND IF SO, UNDER WHAT CIRCUMSTANCES, NON-LAWYER PARENTS MAY PROSECUTE AN IDEA CASE *PRO SE* IN FEDERAL COURT

Six courts of appeals are intractably divided over whether, and if so, under what circumstances, non-lawyer parents may prosecute an IDEA case *pro se* in federal court. This division has resulted in a well-recognized 1-4-1 split. *See Mosley*, — F.3d —, 2006 WL 12982, *4 (CA7 Jan. 4, 2006) (cataloguing split); *Cavanaugh*, 409 F.3d at 756, 757 (applying the holdings of the Second, Third, Seventh, and Eleventh Circuits in part, while expressly rejecting the holding of the First Circuit); *Maroni v. Pemi-Barker Reg'l Sch. Dist.*, 346 F.3d 247, 249-50 (CA1 2003) (expressly disagreeing with the holdings of the Second, Third, Seventh, and Eleventh Circuits); *C.O. v. Portland Pub. Sch.*, — F. Supp. 2d —, 2005 WL 3507983, *8 (D. Or. Dec. 22, 2005) (cataloguing split); S. Rep. No. 108-185, 108th Cong., 1st Sess. 41 (2003) (noting split). Under this split, four court of appeals have limited parents' ability to prosecute an IDEA case *pro se* in federal court depending on the nature of the claims asserted, one court of appeals has placed no limitations on parents' right to do so, and one court of appeals – the court to which certiorari is presently sought – has imposed an absolute bar.

As discussed above, the IDEA confers both substantive and procedural rights for a disabled child and procedural rights for the child's parents. *See supra* at 3-4; *see also Mosley*, 2006

WL 12982, at *4. The Second, Fourth, Seventh, and Eleventh Circuits have all concluded that non-lawyer *pro se* parents may prosecute claims asserting violations of their own procedural IDEA rights but not claims alleging violations of their child's substantive IDEA rights. *See Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147, 1149 (CA7 2001) (per curiam) (holding that parent "was free to represent himself, but as a non-lawyer he has no authority to appear as [his child's] legal representative");[9] *Wenger*, 146 F.3d at 123, 126 (holding that "in federal court a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child" but a parent "is, of course, entitled to represent himself on his claims that his *own* rights as a parent under the IDEA were violated by the [school district's] failure to follow appropriate procedures"); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 233, 235 (CA3 1998) (holding that "the right to proceed *pro se* in federal court does not give non-lawyer parents the right to represent their children in proceedings before a federal court," but the IDEA "clearly grants parents specific procedural rights, which they may enforce in administrative proceedings, as well as in federal court"); *Devine*, 121 F.3d at 581 n.17, 582 (holding that "parents who are not attorneys may not bring a *pro se* action on their child's behalf" but noting that a parent was also a plaintiff and, in appropriate circumstances, could be permitted to prosecute his case without counsel).

The First Circuit has rejected this approach. The First Circuit holds that parents may prosecute an IDEA case *pro se* – "regardless of whether the rights asserted are procedural or substantive" – because they are "parties aggrieved" within the meaning of § 1415(i)(2)(A) of the IDEA. *Maroni*, 346 F.3d at 250. Because "any party aggrieved" by a decision at the final

---

[9] The Seventh Circuit recently reaffirmed *Navin* in a published decision. *See Mosley*, 2006 WL 12982, at *4 (citing *Navin* and stating, "We have no trouble concluding that a parent like Mosley may assert her own procedural rights.").

stage of administrative proceedings may "bring a civil action" in federal district court, 20 U.S.C. § 1415(i)(2)(A), parents in the First Circuit may prosecute both their own procedural and their child's substantive IDEA claims in federal court.

Significantly, however, petitioners' appeal does not reside in the First Circuit, where their entire appeal would be proceeding to briefing on the merits. Nor does their appeal reside in the Second, Third, Seventh, or Eleventh Circuits, where, because the Winkelmans had alleged their own procedural claims, at least part of their appeal would have been allowed to proceed to an evaluation of the merits. Petitioners' appeal lies in the Sixth Circuit, which has rejected the First Circuit's approach and imposed an absolute bar to *pro se* prosecution of an IDEA case that goes well beyond the more nuanced approach of the Second, Third, Seventh, and Eleventh Circuits. In the Sixth Circuit, a parent may not prosecute an IDEA case *pro se* regardless of the nature of the claims asserted because, in its view, "any right on which [a parent] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent upon [the parent's] proceeding, through counsel, with their appeal on [their child's] behalf." *Cavanaugh*, 409 F.3d at 757.

II. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE THAT THREATENS THE EFFECTIVE ENFORCEMENT OF THE IDEA

The question presented is recurring and of exceptional importance. That the issue is recurring cannot be denied. In the three months since the Sixth Circuit issued the order dismissing petitioners' appeal, at least two district courts have ordered the dismissal of IDEA cases based on *Cavanaugh*. *See C.O.*, 2005 WL 3507983, at *8-*10 (dismissing action because non-lawyer parents were prosecuting case *pro se*); *Hart v.*

Shelby County Sch. Dist., No. 03-2845 DV, 2005 WL 2991480, *3 (W.D. Tenn. Nov. 7, 2005) (same). Additionally, the issue is presently awaiting decision in at least one pending appeal and one pending district court proceeding. *See, e.g.*, Brief of Petitioners-Appellants, *Russell v. Dep't of Educ., State of Hawaii*, No. 04-15482 (CA9 Jul. 16, 2004), *available at* 2004 WL 1948965 (urging reversal of dismissal of IDEA case for failure to secure counsel); Def. Mot. S.J., *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. Sep. 20, 2005), *available at* 2005 WL 2979427 (urging summary judgment on basis that parents cannot prosecute IDEA case *pro se*).[10]

Nor can it be denied that the issue is exceptionally important. The IDEA is structured in such a way that the rights of a disabled child are to be pursued by his or her parents in their own name or in the child's name. Congress and the courts have depended on parents to press their child's interests and have commanded schools and educational agencies to get parents involved on the assumption that parental involvement is the best way to ensure maximum protection for the child.

Parents of disabled children, however, face significant difficulties in obtaining counsel to prosecute their IDEA disputes. First, the "majority of lawyers in private practice in the United States work in law firms that represent institutions, not people." David C. Vladeck, *In re Arons: The Plight of the "Unrich" In Obtaining Legal Services*, *in* Legal Ethics: Law Stories 255, 258 (Deborah L. Rhode & David J. Luban eds., 2005). Second, even those lawyers who are willing to represent individuals are often too expensive for the average "unrich" American. *Id.* at 259. That is,

---

[10] The public dockets in these cases show that the issue has not been ruled upon as of the filing of this petition. Because these dockets present facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of them.

> for many Americans legal services are generally unavailable, not by reason of poverty (because most of these people are not poor) but simply because they are not sufficiently wealthy to afford the high cost of legal services. * * * Indeed, many Americans cannot afford anything but the most routine legal services (e.g., preparation of a will).

Id.; *see also* Paula L. Hannaford-Agor, *Helping the* Pro Se *Litigant: A Changing Landscape*, 39 Ct. Rev. 8, 8 (2003) ("The major contributing factor to the increase in self-representation is fairly obvious: a sizeable number of self-represented litigants proceed without a lawyer simply because they lack sufficient income to afford one.")

The IDEA "govern[s] the provision of special education services to nearly 7 million children across the country." *Schaffer*, 126 S. Ct. at 531 (citing Dept. of Education, Office of Special Education Programs, Data Analysis System, http://www.ideadata.org/ tables27th/ar_aa9.htm). Of these 7 million children, 36% live in households with incomes of $25,000 or less, and 32% live in households with incomes of $50,000. *See* Mary Wagner et al., *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002), http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf. For the overwhelming majority of these families, like the Winkelmans, the cost of retaining a lawyer is prohibitive. The prospect of recovering attorneys' fees is a partial incentive at best, as they are awarded only to prevailing parties.

Thus, the primary effect of the decision below – and, in cases where parents do not have their own procedural claims, the decisions of the Second, Third, Seventh, and Eleventh Circuits – will be to prevent parents who need to contest

insufficient administrative findings from protecting their children's interests in court. More dramatically, though probably less-frequently, the decision below will allow school districts that lost at the administrative level to obtain *de facto* reversal if they seek judicial review of adverse administrative findings in court and then secure a default judgment against the prevailing parents because the parents are unable to obtain a lawyer to help them defend their administrative-level victory. Both of these scenarios will undermine the effective enforcement of the IDEA.

To this end, it is no surprise that the Senate committee charged with studying and analyzing the IDEA – the Senate Committee on Health, Education, Labor, and Pensions – devoted significant attention to the issue when the IDEA was due for reauthorization in 2004. Specifically, the Committee recognized that

> there has been disagreement as to whether a parent may, in effect, "represent" their child in a civil action that results from an appeal of a due process hearing. The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have decided this issue based upon a distinction between procedural and substantive claims brought by a parent.
>
> * * * *
>
> Based on current statutory language and on the rich legislative history emphasizing the importance of parental involvement, the committee believes that parents have a right to represent their child in court, without a lawyer,

> for purposes of IDEA law, regardless of whether their claims involve procedural or substantive issues.[11]

S. Rep. No. 108-185, 108th Cong., 1st Sess. 41-42 (2003).

III. NEITHER THE DECISION BELOW, NOR THE DECISIONS OF THE SECOND, THIRD, SEVENTH, AND ELEVENTH CIRCUITS, CAN BE RECONCILED WITH THE A PLAIN READING OF THE IDEA'S STATUTORY TEXT

As the First Circuit has recognized, "[o]n a plain reading of the statute," parents are "parties aggrieved" within the IDEA's right-to-sue provision, 20 U.S.C. § 1415(i)(2)(A). *Maroni*, 346 F.3d at 251. The right-to-sue provision of IDEA, 20 U.S.C. § 1415(i)(2)(A), provides that "[a]ny party aggrieved by the findings and decision made [in a due process hearing] * * * shall have the right to bring a civil action * * * in a district court of the United States." In IDEA cases, federal courts review the outcome of due process hearings. The IDEA grants parents the right to invoke those due process hearings under subsections (f) and (k): "Whenever a complaint has been received * * *, the parents involved in such complaint shall have an opportunity for an impartial due process hearing." 20 U.S.C. § 1415(f)(1). "If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing." 20 U.S.C. § 1415(k)(6)(A)(i). Other sections of the IDEA also refer to

---

[11] The Committee's statements were made in support of a proposal to "clarify" and "make clear" "that a parent of a child with a disability may represent the child in any action * * * in State or Federal court, without the assistance of an attorney." S. Rep. No. 108-185, at 42. Ultimately, however, the Committee's clarifying proposal was not enacted.

parents' right to a due process hearing. *See* 20 U.S.C. § 1415(e)(2)(A)(ii) (requiring that mediation not be used to "deny or delay a parent's right to a due process hearing"). Under the IDEA, states may permit parents to transfer this right to a due process hearing to their child only after their child reaches the age of majority. *See* 20 U.S.C. § 1415(m)(1)(B). Because the statute enables parents to request due process hearings, they are parties to such hearings and thus are logically within the group of "parties aggrieved" given the right to sue.

This reading is buttressed by the provisions of the IDEA that allow appeals to the state educational agency. When a due process hearing is conducted before a local educational agency, 20 U.S.C. § 1415(g) permits "any party aggrieved by the findings and decision rendered in such a hearing [to] appeal such findings and decision to the State educational agency." As the First Circuit noted, in interpreting § 1415(g), numerous courts have treated parents as "parties aggrieved" within the meaning of § 1415(g). *See Maroni*, 346 F.3d at 251-52 (collecting cases). If parents are "parties aggrieved" by due process hearings when seeking to appeal to a state administrative agency, then, logically, they are also parties aggrieved by due process hearings when seeking judicial review. There is no reason why the term "party aggrieved" should have a different meaning in § 1415(i) than in § 1415(g).

This interpretation is further supported by the requirement of administrative exhaustion. Generally, the right to bring an IDEA action under 20 U.S.C. § 1415(i)(2)(A) is subject to the condition precedent that an "aggrieved party" must exhaust administrative remedies, although there are exceptions. By statute, it is the parents who may invoke those administrative remedies. *See* 20 U.S.C. § 1415(f)(1). It would make little sense if the parents who are explicitly permitted to invoke those administrative remedies and to exhaust them could not be parties for purposes of bringing suit.

The Third Circuit held that, if Congress had intended the term "party aggrieved" under IDEA to mean parents, it would have explicitly said so. *Collinsgru*, 161 F.3d at 232. Congress did explicitly say that parents could bring due process hearings, and so, according to *Collinsgru*, the rule of *expressio unius est exclusio alterius* means that Congress did not intend parents to be able to sue. *See id.* This rule has no application here. Congress needed to include several categories of plaintiffs – school districts, parents, and children – and so used a collective term. The IDEA does not refer to "child aggrieved" as it easily could if only the child could sue. Nor does § 1415(i)(2)(A) refer to school districts, even though they may seek review under it. The only plausible explanation for the IDEA's use of the term "party aggrieved" instead of "parents" is that Congress sought to confer the right to judicial review of due process hearings upon all parties involved in such hearings: school districts, parents, and children.

IV. THIS CASE IS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED

A. The Issue Presented Was Squarely Decided Below, There Are No Impediments to this Court Granting Petitioners the Relief They Seek, and the Circuit Split Over the Issue Is Now Mature and Ripe for this Court's Review

This case presents an appropriate vehicle to resolve the question presented. The issue was squarely presented and resolved below; indeed, it was the only issue decided in the order that would be the subject of this Court's review. Moreover, petitioners would manifestly benefit from a ruling their favor, inasmuch as it would allow them to avoid dismissal solely because they are unable to afford a lawyer and continue to prosecute their appeal.

Additionally, this case is a far more suitable vehicle than the two previous cases presenting the issue where review was sought. *Devine* was the first appellate decision to confront the issue. Accordingly, as the *Devine* petitioners conceded themselves, there was no inter-circuit conflict. *See* Pet. for Cert. 10, *Devine v. Indian River County Sch. Bd.* (No. 97-929) ("[W]e cannot represent that there is a square conflict.").

The same is true with respect to *Wenger*, which was decided just seven months after *Devine* and was the third of three consecutive appellate decisions to confront the issue and decide it the same way. *See generally* Pet. for Cert., *Wenger v. Canastota Cent. Sch. Dist.* (No. 98-7722).

In stark contrast, a square conflict among the circuits has developed in the nearly eight years since the *Devine* and *Wenger* petitions were filed. *See supra* at 11-13. That three-way split is mature and ripe for this Court's intervention. *See supra* at 11-13.

B. Supreme Court Rule 11 Should Not Apply Because This Case Is Not a True Case of Certiorari Before Judgment

Supreme Court Rule 11 states that this Court will grant certiorari "before judgment is entered in [a court of appeals] * * * only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." We anticipate that respondent will argue that Rule 11 makes this case an inappropriate vehicle for deciding the question presented because, in opposing petitioners' stay application, respondent did so.[12]

---

[12] Justice Stevens, who applied the traditional four-factor test for a stay pending certiorari – one factor of which is whether there is a "reasonable probability" that certiorari will be granted, *see California v. Am. Stores Co.*,

(continued...)

Crucially, this case is not a "true case of certiorari before judgment" because it "did not bypass the court of appeals." James Lindgren & William P. Marshall, *The Supreme Court's Power to Grant Certiorari Before Judgment in the Court of Appeals*, 1986 Sup. Ct. Rev. 259, 267; *see also id.* at 277 ("Certiorari before judgment is designed to permit the Court to * * * bypass[] the court of appeals."); Robert L. Stern et al., Supreme Court Practice § 4.20, at 262 (8th ed 2002) (noting that certiorari before judgment is traditionally considered to involve "skipping the court of appeals").[13] Rather, in this case, certiorari is sought to review an order that originated in the court of appeals. Accordingly, this petition is more akin to one that seeks review of an interlocutory district court order over which the court of appeals has already passed than it is to a certiorari before judgment case. In both a traditional interlocutory review case and in this case, no intermediate court is being bypassed and no court other than this Court can afford relief.

While we recognize that certiorari from interlocutory appeals is disfavored, *see, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Estelle v.*

---

[12] (...continued)
492 U.S. 1301 (1989) (O'Connor, J., in chambers) – when he granted petitioners' stay application, apparently did not believe that Rule 11 was this petition's death knell.

[13] Indeed, our survey of cases in which this Court has granted certiorari before judgment show that, in all but one case, certiorari was sought to bypass the court of appeals entirely. In other words, in all but one case, certiorari before judgment was sought to review the district court's judgment – not an interlocutory decision of the court of appeals. The one exception is *Barefoot v. Estelle*, 463 U.S. 880 (1982) (reviewing court of appeals' denial of certificate of probable cause and stay of execution before court of appeals had reviewed the merits of the district court's denial of petitioner's underlying habeas petition).

Gamble, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting) (referring to "the Court's normal practice of denying interlocutory review"), "the interlocutory status of the case may be no impediment to certiorari where the opinion of the court below has decided an important issue, otherwise worthy of review." Stern et al., *supra*, § 4.18, at 260; *see also id.* § 4.18, at 259 (noting that when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status"). Accordingly, this Court has not hesitated to review an interlocutory judgment of a court of appeals when "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893); *see also, e.g., Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (granting certiorari to review interlocutory order where "effect of the order is immediate and irreparable, and any review by this Court of the propriety of the order must be immediate to be meaningful"); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (reviewing court of appeals' reversal of a district court's denial of a motion to dismiss a complaint because "fundamental to the further conduct of the case").

This case clearly presents an issue which is "fundamental to the further conduct of the case." *Land*, 330 U.S. at 734 n.2. Absent this Court's intervention, petitioners will have to choose between either (a) allowing the court of appeals' dismissal order to become final so they can once again petition this Court for review or (b) obtaining a lawyer that they cannot afford and moot any future opportunity to test their belief in their right to prosecute their appeal *pro se*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEAN-CLAUDE ANDRE
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Avenue
Los Angeles, CA 90034
Tel./Fax: (310) 558-0932

February 2, 2006

APPENDIX A

No. 05-3886

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JACOB WINKELMAN, a minor, by and through his parents and legal guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN,

Plaintiffs-Appellants,

v.

PARMA CITY SCHOOL DISTRICT,

Defendant-Appellee.

(Filed November 4, 2005)

ORDER

Before KEITH, KENNEDY, and BATCHELDER, Circuit Judges.

The matter is before the court upon consideration of appellee's motion to dismiss the appeal unless the appellants obtain counsel. The appellants filed a response to which the appellee replied.

Jeff Winkelman and Sandee Winkelman brought this action under the Individuals with Disabilities Education Act (IDEA) on behalf of their son, Jacob. As established in this

court's order filed on September 20, 2005, in related appeal No. 04-4159, Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*. *See Cavanauh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756-57 (6th Cir. 2005).

Accordingly, in conformity with *Cavanaugh*, 409 F.3d at 757, this appeal is dismissed unless within thirty days of the entry of this order an appearance of counsel is entered in this appeal to represent Jacob.

ENTERED BY ORDER OF THE COURT

/s/ [Leonard Green]
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JACOB WINKELMAN, ET AL.,

Plaintiffs,

vs.

PARMA CITY SCHOOL DISTRICT,

Defendant.
_____/

CASE NO. 1:04CV1329

(Filed June 2, 2005)

Judge John M. Manos

MEMORANDUM OF OPINION

On March 2, 2005, Plaintiffs, Jeff, Sandee, and Jacob Winkelman (collectively, the "Winkelmans") filed a Motion for Judgment on the Pleadings Based on the Administrative Record.[1] (Docket No. 35.) On March 17, 2005, Parma City School District ("Parma") filed a Motion for Judgment on the Pleadings Based on the Administrative Record. (Docket No. 38.) The issue on appeal is whether or not Parma provided Jacob Winkelman with a free appropriate public education

---

[1] The Winkelmans actually filed a motion for summary judgment. However, because neither party has expressed a desire to supplement the record, a motion for summary judgment is inappropriate. Dong ex. rel. Dong v. Board of Educ., 197 F.3d 793, 798-99 (6th Cir. 1999). Although the Winkelmans initially sought to supplement the record, their counsel clarified that the request was simply intended to bring to the Court's attention new Sixth Circuit case law. Thus, because the Winkelmans believe that all the necessary facts are set forth in the administrative record, (Brief, Docket No. 35, at 5), the Court will construe their motion as one for judgment based on the administrative record. See id. at 799.

("FAPE")[2] as mandated under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et. seq., and analogous state law, O.R.C. § 3323.01 et. seq. The Court has jurisdiction under 28 U.S.C. § 1331.

All issues have been fully briefed and are ripe for adjudication. For the following reasons, the Winkelmans' Motion for Judgment on the Pleadings Based on the Administrative Record is **DENIED** and Parma's Motion for Judgment on the Pleadings Based on the Administrative Record is **GRANTED**.

I. FACTUAL BACKGROUND

Plaintiffs are Jacob Winkelman, a seven-year old boy diagnosed with autism, and his parents, Jeff and Sandee Winkelman. In July of 2001, Jacob attended preschool at the Achievement Center for Children ("Achievement Center"). Parma paid for this program because Jacob did not respond well to its own program. Achievement Center offers a special education intervention program including physical therapy, occupational therapy, speech therapy, and music therapy.

On September 1, 2001, Parma school officials met with the Winkelmans to discuss an Individualized Education Program ("IEP")[3] for Jacob. The parties agreed that Achievement Center was an appropriate placement for the 2001-02 and 2002-03 school years.

---

[2] A "free, appropriate public education" consists of "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." Board. of Educ. v. Rowley, 458 U.S. 176, 188-89 (1982).

[3] An "individualized education program" details the services "tailored to the unique needs of the handicapped child." Rowley, 458 U.S. at 181.

On June 2, 2003, the parties met to discuss Jacob's IEP for the 2003-04 school year. The 2003-04 IEP proposed educating Jacob in a special education classroom at Pleasant Valley Elementary School ("Pleasant Valley"). Pleasant Valley is a public school that offers speech and occupational therapy and would provide Jacob with an opportunity to interact with six other students with varying disabilities. The educators at Pleasant Valley are trained to educate children with autism.

The Winkelmans were unhappy with the proposed 2003-04 IEP. Specifically, they complained that the proposed 2003-04 IEP did not include music therapy, did not contain a sufficient amount of speech therapy nor one-on-one interaction, and did not contain any specific plan to implement the need for occupational therapy. Moreover, they preferred placing Jacob at Monarch School. Monarch School is a private school that specializes only in autism and emphasizes one-on-one interaction between students and educators with limited peer interaction. Nonetheless, the Winkelmans signed the proposed 2003-04 IEP and although they objected to his placement, they consented to the initiation services. (Parma's Ex. K before IHO, at 157.)

On June 2, 2003, the Winkelmans filed a request for a due process hearing with Impartial Hearing Officer ("IHO") Joy Freda alleging that Parma failed to provide Jacob with a FAPE. On August 27, 2003, IHO Freda issued an interim order designating Achievement Center as Jacob's stayput placement. Nonetheless, the Winkelmans unilaterally pulled Jacob from that program and placed him at Monarch School. Jacob performed well at Monarch School during the 2003-04 school year. However, because of the expense of private education, they did not enroll Jacob in Monarch School for the 2004-05 school year. Presently, Jacob is not enrolled at any school but does participate in a one-to-two hour a week outreach program at Monarch School.

On February 25, 2004, IHO Freda issued a fifty-six page decision finding that Parma provided Jacob with a FAPE and thus, did not violate the mandates of the IDEA. The Winkelmans appealed to State Level Review Officer ("SLRO") Theresa L. Hagen. On June 2, 2004, she issued a forty-four page opinion affirming IHO Freda's decision.

On July 15, 2004, the Winkelmans appealed to this Court. On March 2, 2005, they filed the current motion for judgment on the pleadings based on the administrative record. They are seeking reversal of SLRO Hagen's decision and reimbursement for educating Jacob at Monarch School. On March 27, 2005, Parma filed the current motion for judgment on the pleadings based on the administrative record. It is seeking affirmance of SLRO Hagen's decision in its entirety.

II. LEGAL STANDARD

The IDEA's provision governing federal court review over state administrative decisions states: "the court (i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(i)(2)(C). To prevail on the merits, a plaintiff must establish either that (1) the state has not complied with the IDEA's procedural mandates, or (2) the proposed IEP is not reasonably calculated to enable the child to receive educational benefits. Rowley, 458 U.S. at 206-07.

Procedural issues are strictly reviewed for compliance; although technical deviations will not render an IEP invalid. Dong, 197 F.3d at 800. Substantive issues are reviewed under a modified *de novo* standard: although the district court is required to make independent decisions based on the preponderance of the evidence, it must give due weight to the determinations made by state administrators. Knable v.

Bexley City Sch. Dist., 238 F.3d 755, 763-64 (6th Cir. 2001) (quoting Rowley, 458 U.S. at 206). Accordingly, the Supreme Court has cautioned that although the district court should not simply adopt the findings of fact of the state administrators without re-examining the evidence, it may not simply substitute its own notions of sound educational policy for those of the state hearing officers. Rowley, 458 U.S. at 206.

The burden of proof in the Sixth Circuit rests with the party challenging the terms of the IEP. Dong, 197 F.3d at 799. Here, the burden rests with the Winkelmans. They allege three procedural violations and three substantive violations.

III. LAW AND ARGUMENT

A. Procedural Violations

1. Use of Assistant

The Winkelmans argue that IHO Freda violated the procedures set forth in the IDEA by allowing another person to "co-preside" over the proceedings. However, nothing in the record suggests that IHO Freda's research assistant, Ann Oakar, co-presided over the proceedings. Also, nothing in the record suggests that either party objected to the use of a research assistant. To the contrary, IHO Freda's Disclosure Conference Memorandum specifically states that "[a]lso present was Ann Oakar, attorney, an invitee of the hearing officer after consent of both parties." (IHO Ex. 20, at 1) (emphasis added). At the start of the hearing, IHO Freda again asked the parties if there were any procedural errors that might interfere with the proceeding and both parties responded, "no." (IHO Tr. at 14.)

The Winkelmans' citation to O.A.C. § 3301-51-08 is

unavailing. Although O.A.C. § 3301-51-08 details the qualifications and duties of a hearing officer, it does not prohibit the use of a research assistant. Most telling, the Winkelmans are unable to cite a single legal authority that holds that a hearing officer is not allowed to employ a research assistant. Absent any evidence that Ms. Oakar somehow interfered with the process, the Court concludes that the use of a research assistant by an impartial hearing officer does not constitute reversible error.

2. Timing Delay

The Winkelmans argue that because the administrative proceeding went 217 days beyond the 45-day deadline, the procedural requirements of the IDEA were violated. The Ohio Administrative Code, Section 3301-51-08 (G)(1)(a) states that "the Ohio Department of Education shall ensure that not later than forty-five days after the receipt of a request for a due process hearing [a] final decision is reached in the hearing." See also 34 C.F.R. § 300.511(a). Section 3301-51-08(G)(3) authorizes the IHO to grant extensions of time beyond the forty-five day requirement. See also 34 C.F.R. § 300.511(c). Section 3301-51-08(G)(3)(b) states that any "extension of time beyond the forty-five days at the request of either party pursuant to this rule shall not be considered a failure to meet timelines."

Here, the Winkelmans requested a due process hearing on June 5, 2003. Thus, the final decision, filed on February 20, 2004, was well beyond the 45-day deadline. However, the first extension (30 days) was at the request of the Winkelmans so that they could retain counsel. (IHO Exs. 5 & 6.) The second extension (90 days) was at the request of both parties, jointly, so that they could resolve a stay-put placement issue and prepare for the due process hearing. (IHO Exs. 9 & 10.) The third extension (36 days) was, again, at the request of both parties, jointly, so that they could submit briefs. (IHO

Ex. 31.) Thus, under the authority of O.A.C. § 3301-51-08 (G)(3)(b), these delays are not to be considered a failure to meet the 45-day deadline.

The fourth (7 days) and fifth (39 days) extensions were at the request of Parma to allow IHO Freda time to thoroughly consider the record, conduct research, and review the evidence. (IHO Ex. 31.) The Winkelmans did not join in these requests, nor did they offer an objection. Given the size of the administrative record, IHO Freda did not err in granting these two requests for additional time. As IHO Freda correctly stated when granting the last extension, Jacob "remains enrolled at Monarch School, the preferred placement of the parents, and is not adversely impacted by this delay." (IHO Ex. 31.) Although the Court does not condone the delay, the IDEA and the Ohio Administrative Code clearly provide some flexibility upon the filing of a motion for good cause. The Court concludes that all extensions were in response to a motion for good cause and that the delay does not constitute reversible error.

Moreover, the Winkelmans have not shown that the delay caused such substantive harm as to deny Jacob a FAPE. See Deal v. Hamilton County Bd. of Edu., 382 F.3d 840, 854 (6th Cir. 2005) (citing Knable, 238 F.3d at 764). The only harm alleged is financial: "[s]uch delay caused [Jacob's] parents to use up all of their resources for providing [Jacob] with an appropriate education at the Monarch School, which has resulted in [Jacob] not having any services for extended school year services for 2004 and not having any services for the 2004-2005 school year." (Brief, Docket No. 35, at 5.) However, when Jacob was enrolled at Monarch School, a place for him was available at the Achievement Center. In violation of IHO Freda's August 27, 2003 stay-put placement order, the Winkelmans unilaterally pulled Jacob from the Achievement Center and placed him at Monarch School. The Supreme Court has held that "parents who unilaterally change

their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." School Comm. of Burlington, Mass. v. Department of Educ. of Mass., 471 U.S. 359, 373-74 (1985). Thus, any financial harm suffered by the Winkelmans is a result of their own doing and not a result of IHO Freda's delay.

3. Predetermination

The Winkelmans argue that Parma predetermined to place Jacob in its own program prior to developing his 2003-04 IEP. The Sixth Circuit has held that predetermining not to offer a child certain services without effective participation by the parents amounts to a procedural violation of the IDEA and causes such substantive harm as to deprive the child a FAPE. See Deal, 392 F.3d at 855-59. However, the Winkelmans did not raise this issue with IHO Freda, nor with SLRO Hagen. District courts are not authorized to rule upon issues beyond those presented to the IHO and SLRO. Metropolitan Bd. of Pub. Educ. v. Guest By & Through Guest, 193 F.3d 457, 463 (6th Cir. 1999). As the Sixth Circuit reasoned, "[w]ere federal courts to set themselves up as the initial arbiters of the handicapped children's educational needs before the administrative process is used, they would endanger not only the procedural but also the substantive purposes of the Act." Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989). Parma has never had an opportunity to defend itself against allegations of predetermination. Although the Court is authorized to hear new evidence, the Sixth Circuit is clear that new evidence cannot be heard on issues never presented to the IHO or SLRO. Guest, 193 F.3d at 463. Thus, the Court lacks jurisdiction to address this issue.

Even if the Court had jurisdiction, the administrative record does not support an allegation of predetermination.

First, the Winkelmans were able to participate at every step of Jacob's education. They were present at the 2003-04 IEP meetings and consented to the initiation of services. (Parma's Ex. K before IHO, at 154.) Second, Parma readily paid to enroll Jacob at the Achievement Center when it was shown that Jacob was not responding well to its own program. Third, there is no evidence that Parma has a predisposition against placing a child at Monarch School. Mrs. Winkelman did not even begin to consider Monarch School until after the June 2, 2003 IEP meeting. (Tr. at 81.) She also testified that Dr. Judith Hudgins, Parma's Special Education Supervisor, did not discourage her from looking into other programs. (Tr. at 47.) Finally, Susan Rueger, Pleasant Valley's principal, testified that Pleasant Valley would provide any service that Jacob's IEP required. (Tr. at 648-49.)

In short, this is a far cry from the situation in Deal where the Sixth Circuit found (1) numerous procedural and substantive errors, (2) that the school district had an unofficial policy of refusing to consider certain programs regardless of the child's needs, and (3) that the district's main concern was financial. 392 F.3d at 855-59. Indeed, in Deal, the parents were not even allowed to ask questions during the IEP meetings. Id. at 855. Thus, even if the Court had jurisdiction over this issue, the record does not support an allegation of predetermination.

B. Substantive Violations

1. Occupational Therapy

The parties agree that Jacob's 2003-04 IEP did not contain specific goals and objectives for occupational therapy. Instead, it guaranteed to assess Jacob for occupational therapy and mandated that such assessment be completed within thirty days of the new school year. The issue is whether or not a guarantee to assess Jacob for occupational therapy as opposed

to setting forth specific goals and objectives constitutes a substantive violation and denies Jacob a FAPE.

An IEP is defined as a "written statement for a child with a disability that is developed, reviewed, and revised in accordance with section [1414(d)]." 20 U.S.C. § 1401(14). It must include:

> (1) a statement of the present levels of educational performance of the child, (2) a statement of annual goals, including short-term instructional objectives (3) a statement of the specific educational services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs, . . . (5) the projected date for initiation and anticipated duration of these services, and (6) appropriate objective criteria and evaluation procedures for schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

34 C.F.R. § 222.50 (2005); Cleveland Heights-University Heights City Sch. Dist. v. Boss by & through Boss, 144 F.3d 391, 398 (6th Cir. 1998). "Related services" include "transportation and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(26)(A). "Occupational therapy" is considered a "related service." Specifically, "occupational therapy" includes "(1) improving, developing or restoring functions impaired or lost through illness, injury, or deprivation, (2) improving ability to perform tasks for independent functioning if functions are impaired or lost, and (3) preventing, through early intervention, initial or

further impairment or loss of function." 34 C.F.R. § 300.24(5) (2005).

Here, Jacob's 2003-04 IEP identifies his present performance levels for occupational therapy. It also indicates that occupational therapy is a necessary related service. (Parma's Ex. K before IHO, at 157). However, instead of providing annual goals, short-term objectives, and a description of the services to be provided, it only recommends that Jacob be assessed for occupational therapy within the first month of the new school year. Id. at 145; 149. The Winkelmans consented to this portion of the IEP. Id. at 154.

Julia Peacock, Parma's occupational therapist, explained the reason for the delay:

> I was not comfortable writing IEP goals . . . because I had never seen Jacob and was not comfortable writing goals on what the OT currently had goals on because they were things like tying his shoes which at five to six, you should be working on, but he shouldn't actually quite know how to do it yet. It would be good if he could. Cutting out squares and things like that, I really wanted to see where he was at before I put on goals. He might need harder goals, and I really wanted to look at where the problems were occurring instead of just putting on a goal. If it was a sensory problem we needed to attack it from more of a sensory issue and not just cutting on a line.
>
> . . .
>
> This was a new environment, and we weren't sure how he was going to transition. So, there was no point to putting that in until we knew

> how he did in the beginning and figured out how to modify the environment for him. . . . [T]his is very typical; that we think it's best to do it when we get to know the child a little bit and he has been here for a while and we see how he is actually doing and what problems he is having.

(IHO Tr. at 297-98.)

Based on this testimony, IHO Freda concluded that the lack of specific goals and objectives for occupational therapy constituted a procedural technical violation of the IDEA as opposed to a substantive violation. She provided four reasons to support her conclusion. First, she found Ms. Peacock to be a very credible witness who wanted to set new goals for Jacob reflecting his current levels of performance within the scope of his new environment as opposed to simply recycling old goals. Second, she agreed that "the assessment of [Jacob's] abilities and adaptation to his new environment are the most important factors in the creation of appropriate goals and objectives." (IHO decision, at 48.) Obviously, measuring Jacob's level of adaptation to his new school environment required Ms. Peacock to first observe him in his new environment, thus justifying the delay. Third, she concluded that because Jacob's motor skills were on par with the majority of motor skills required for kindergarten-readiness, he would not be significantly impacted by the thirty-day delay. Rather, she found that "the overall impact on the child's long-term progress may be greater with the development of goals and objectives based on timely data and tailored to the child's unique needs." (IHO decision, at 49.) Finally, she noted that the Winkelmans consented to the initiation of services.

Two Sixth Circuit cases are instructive on this point. In Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990), the court

held that an IEP that did not include present educational performance levels and objective criteria for determining whether instructional goals were being met constituted a mere technical violation of the IDEA. The court reasoned that the absent information was known to all parties and that the parents had actually requested the delay so that their child could first adjust to the new experience of middle school. Id. at 1189. Also the court reasoned that emphasis should be placed on "the process by which the IEP is produced rather than the myriad of technical items that must be included in the written document." Id. at 1190.

However, in Cleveland Heights-University Heights City Sch. Dist. v. Boss by & through Boss, 144 F.3d 391 (6th Cir. 1998), the court held that an IEP that did not include objective criteria for determining whether instructional goals were being met constituted a substantive violation of the IDEA and denied the child a FAPE. The court reasoned that the omitted information went to the heart of the substance of the IEP. Id. at 399. Moreover, unlike the situation in Defendant I, the parents refused to approve the IEP. Id. at 394. Also, unlike the situation in Defendant I, both state administrative officers ruled in favor of the parents. Id. at 398. Under the IDEA's deferential standard of review, federal courts are required to give these state administrative decisions due weight. Finally, the Sixth Circuit noted that the school district refused to reassess the IEP until three months after the school year had started. Id.

The Court concludes that the present situation is more akin to the situation in Defendant I than in Boss. First, the absent information was known to the Winkelmans and still, they did not object to the implementation of services. See e.g. Berger v. Medina City Sch. Dist., 348 F.3d 513, 520 (6th Cir. 2003). Second, both state administrative officers ruled in favor of the school district and their decisions require some deference. Third, the reason for the delay was to allow Jacob

time to adjust to his new school environment. Finally, unlike the three month delay in Boss, Parma agreed to re-assess Jacob within the first month of the new school year.

The Winkelmans argue that affirming the decisions of the state administrative officers "will set a dangerous precedent allowing school administrators to place handicapped children in school without first developing the statutorily mandated goals and objectives and without first detailing the provisions for services to be provided." (Brief, Docket No. 35, at 13.) They raise a valid concern. Indeed, IHO Freda stated that identifying a needed service and then delaying the creation of goals and objectives is not the "preferred practice." (IHO Decision, at 48.) Nonetheless, the entire IEP team (with initial consent by the Winkelmans) and both state administrative officers all agreed that the one month delay was in the best interest of Jacob. The Court must give these determinations due weight. Knable, 238 F.3d at 763-64 (quoting Rowley, 458 U.S. at 206).

In doing so, the Court does not wish to make light of the procedural and substantive requirements of the IDEA. However, given that Jacob was entering a completely new school setting and given the overall consensus that the one-month reassessment was in his best interest, the Court concludes that the lack of goals and objectives for occupational therapy only constitutes a procedural technical violation of the IDEA and not reversible error. As the Sixth Circuit stated, to say that such technical deviations render an IEP invalid "is to exalt form over substance." Defendant I, 898 F.2d at 1190.

2. Speech Therapy and Academics

The Winkelmans argue that the reduction of speech therapy from 90 minutes to 60 minutes and the lack of one-on-one academic instruction constitutes a substantive

violation of the IDEA and denies Jacob a FAPE.

"Speech-language pathology services" is considered a "related service" and includes "(1) identification of children with speech and language impairments, (2) diagnosis and appraisal of specific speech and language impairments, (3) referral for medical or other professional attention necessary for the habilitation of speech or language impairments, (4) provision of speech and language services for the habilitation or prevention of communicative impairments, and (5) counseling and guidance of parents, children, and teachers regarding speech and language impairments." 34 C.F.R. § 300.24(14) (2005).

There is no dispute that the 2003-04 IEP, with regard to speech therapy, satisfies the requirements of 34 C.F.R. § 222.50. The only issue is whether or not Jacob can receive some educational benefits from 60 minutes of speech therapy.

The recommendation of 60 minutes per week came from Michelle Munci, Parma's speech language pathologist:

> I can tell you what I thought when I wrote 60 minutes. Jacob being placed in the classroom, he would be receiving speech, and these goals would be carried through throughout his entire day anyway just like it was at the Achievement Center. I felt I needed the 60 minutes to do more specialized training, but that he would still be receiving speech contact because the teachers carry through these things the entire day. They are very language classrooms.

(Tr. at 282.) She based her conclusions on (1) discussions with Jacob's teacher and speech pathologist at Achievement Center, (2) data from the Achievement Center and Parma, and (3) personal observations. (Tr. at 286-87.)

No evidence in the record suggests that Jacob requires 90 minutes of speech therapy per week to receive educational benefits. Although he was receiving 90 minutes per week at the Achievement Center, that was the standard amount for all children there. (Tr. at 473-74.) As IHO Freda correctly noted, the fact that Jacob was progressing with 90 minutes of speech therapy at the Achievement Center does not mean that 60 minutes would offer him no educational benefits. (IHO decision, at 46.) Obviously, more time would most likely produce more results, but as the Sixth Circuit stated, a school district is only required to "provide the educational equivalent of a serviceable Chevrolet . . . [i]t is not required to provide a Cadillac." Doe v. Board of Educ. of Tullahoma City Sch., 9 F.3d 455, 459-60 (6th Cir. 1993). Absent any evidence that Jacob actually needs 90 minutes of speech therapy per week to receive educational benefits, IHO Freda did not err in concluding that 60 minutes would still provide Jacob a FAPE.

The Winkelmans also take issue with the lack of one-on-one academic training in Jacob's 2003-04 IEP. This issue goes to the heart of the dispute between the parties. Parma prefers placing Jacob at Pleasant Valley, which focuses on peer interaction. The Winkelmans prefer placing Jacob at Monarch School, which provides almost no opportunity for peer interaction.

Julie d'Aliberti, Pleasant Valley's kindergarten teacher, testified that "as far as [Jacob's] social and communicative needs, it appears that he would mesh very well with the other students in my classroom due to what I know their needs are and what their levels are." (Tr. at 546.) Michelle Munci, Parma's speech language pathologist, testified that Jacob was successful in small group activities when she observed him at Achievement Center. (Tr. at 269.) She concluded that Jacob would perform well at Pleasant Valley because "he needs to learn how to interact better with peers." (Tr. at 275-76.) All of the witnesses unanimously agreed that learning to interact

with peers is one of Jacob's most important needs. (Munci, Tr. at 275-76; Gerber, Tr. at 461; Lumadue, Tr. at 247; Mendell, Tr. at 198; Alspach, Tr. at 159.) As Amy Marie Lumadue, a mental health therapist at Beech Brook Mental Health Center, aptly stated, "life is not a one on one setting." (Tr. at 255.)

Although Jacquelyn Gerber, Jacob's preschool teacher at the Achievement Center, Ms. Lumadue, Debra J. Mandell, director at Monarch School, and Jaime Alspach, a music therapist at Music Therapy Enrichment Center, all testified that Jacob tends to learn better in a one-on-one setting, (Tr. at 436-37, 249-50, 198-99, 151), none of these witnesses testified that Jacob needs a one-on-one setting to receive educational benefits. To the contrary, Ms. Gerber conceded that Jacob could succeed at Pleasant Valley if the program remained structured. (Tr. at 464-65.) Ms. Mendell conceded that Jacob was doing well in his small group instruction period and that he could learn from a program that included more peer interaction. (Tr. at 199, 214.) Finally, Ms. Alspach stated that Jacob enjoyed being with his peers and that he would certainly benefit from more peer interaction. (Tr. at 151, 159.)

The only witness who was adamant that Jacob needed one-on-one interaction to receive any educational benefits was Dr. Morris Levinsohn, Jacob's pediatric neurologist. He gave his "firm medical recommendation" that one-on-one instruction was critical for Jacob to be successful in a school setting. (Tr. at 314, 342-43.) IHO Freda was not persuaded by his testimony. She reasoned that he is not an educator, he only had limited personal interaction with Jacob, and he had never observed Jacob in a classroom setting. More importantly, most of his information regarding Jacob came from the Winkelmans. For example, he only recommended music therapy because the Winkelmans told him that Jacob likes music. (Tr. at 326.)

In evaluating all of this evidence, IHO Freda made the following conclusions:

> Again, there is no evidence that the child needs a set amount of one-on-one instructional time to receive a [FAPE]. While it is in fact a truism that any child would receive educational benefit from significant amounts of one-to-one instruction, the IDEA does not require an ideal education or the best education available for a certain child.
>
> . . .
>
> The school district's proposed placement of the child for the 2003-2004 school year involves a special education classroom consisting of six to eight students with a teacher and two aides. One-to-one and small group instruction would be provided throughout the day; in addition, the child would be exposed to both disabled and nondisabled peers and would be afforded the opportunity to generalize his social and language skills across diverse environments.
>
> . . .
>
> Pleasant Valley Elementary School is not only appropriate as the least restrictive environment, but is clearly preferable to the parents' choice of Monarch School where the child is instructed in a one-on-one environment for the greater part of the day.

(IHO Decision, at 42-45) (emphasis added.)

Given the overwhelming consensus that Jacob needs more peer interaction and that he would receive some educational benefits from Pleasant Valley, the Court concludes that IHO Freda did not err in finding that Pleasant Valley is an appropriate placement for Jacob, despite the reduced amount of one-on-one instruction. Also, contrary to the Winkelmans' assertion, IHO Freda was not required by law to rely Dr. Levinsohn's testimony. Rather, she was well within her right to disregard it based on his lack of expertise in education, his limited personal interaction with Jacob, and the fact that he never observed Jacob in an educational setting. Indeed, a finding of witness credibility is seldom subject to review. See United States v. Gessa, 57 F.3d 493, 496 (6th Cir. 1995).

3. Music Therapy

The Winkelmans argue that the lack of music therapy in Jacob's 2003-04 IEP constitutes a substantive violation of the IDEA and denies Jacob a FAPE. Music therapy is a "related service" and only necessary if the child needs the service to receive educational benefits. Neeley v. Rutherford County Sch., 68 F.3d 965, 969 (6th Cir. 1995). Music therapy was provided for in Jacob's 2001-02 IEP and 2002-03 IEP (Parma's Exs. G and I before IHO). However, no music therapy was provided for Jacob in his 2003-04 IEP. The question is whether or not Jacob needs music therapy to receive educational benefits.

Jaime Alspach, Jacob's music therapist at the Music Therapy Enrichment Center, testified that music therapy was put into Jacob's 2001-02 IEP and 2002-03 IEP because

> [I]t was shown that music was motivating to him, provided structure to him that allowed to work better on his objectives, and from anecdotal data as well as data we saw, he was

> often performing better on IEP objectives within the music setting than in a nonmusic setting, perhaps the speech or with a teacher.

(Tr. at 156.) However, she conceded that it was not necessary to sing to Jacob for him to understand things. (Tr. at 157.) Mary Beth Koss, the manager of the education department at the Achievement Center, and Ms. Gerber, Jacob's preschool teacher, both agreed that although music therapy certainly aided Jacob, he could still learn outside the music therapy context and pick up skills without the use of music. (Tr. at 398, 450.) Contrary to the Winkelmans' claim, neither Ms. Mendell from Monarch School nor Ms. Lumadue from Beech Brook testified that Jacob needs music therapy to receive educational benefits. The only witness who testified as such was Dr. Levinsohn. The Court has already concluded that IHO Freda was permitted to disregard his testimony because his recommendation was not based on any personal observations but solely on the fact that he was told that Jacob likes music. (Tr. at 325-26.) Moreover, Dr. Levinsohn is not an expert in education.

It is quite evident that Jacob loves and responds well to music. (McNulty, Tr. at 100; Alspach, Tr. at 147; MacGuire, Tr. at 175; Lumadue, Tr. at 251; Gerber, Tr. at 421, 450, 469.) Fortunately, Jacob's would-be teacher at Pleasant Valley incorporates music into her lesson plans. (Tr. at 529.) Also, Pleasant Valley offers an adaptive music class geared for children with autism. (Tr. at 496.) These services should be very beneficial to Jacob. However, the record does not support the notion that Jacob needs music therapy to receive educational benefits. The only witness to testify to that effect was Dr. Levinsohn, whose testimony was permissibly disregarded by IHO Freda. Thus, the fact that Jacob's 2003-04 IEP did not include music therapy does not constitute reversible error nor deny him a FAPE.

IV. CONCLUSION

For the following reasons, Plaintiffs' Motion for Judgment on the Pleadings Based on the Administrative Record (and request for reimbursement) is **DENIED**; and Defendant's Motion for Judgment on the Pleadings Based on the Administrative Record is **GRANTED**. Each party to bear its own costs.

IT IS SO ORDERED.

Date: June 2, 2005 */s/* ***John M. Manos***
UNITED STATED
DISTRICT JUDGE

(3)

No. 05-983

Supreme Court, U.S.
FILED
APR 6 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JACOB WINKELMAN, *et al.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT PARMA CITY SCHOOL DISTRICT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHRISTINA HENAGEN PEER
(*Counsel of Record*)
CHRISTINE TOMKO COSSLER
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 479-8500
Fax: (216) 479-8780

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether in adhering to the long-standing rule prohibiting lay representation of another's legal interests in court, the Sixth Circuit properly concluded non-attorney parents may not represent their child in court under the Individuals With Disabilities In Education Act ("IDEA").

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Parma City School District states that it is not a subsidiary or affiliate of any corporation including any publicly held corporation.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Corporate Disclosure Statement	ii
Table Of Contents	iii
Table Of Authorities	vi
Opinions Below	1
Statutory Provisions Involved	1
Introduction	1
Statement Of The Case	4
A. Statutory Framework And Legislative History	4
1. The IDEA Does Not Give Parents The Right To Legally Represent Their Child In Court	4
2. Congress Recently Refused To Enact A Proposed Amendment Providing Parents The Right To Prosecute Judicial IDEA Actions On Behalf Of Their Child	5
B. Factual And Procedural Background	6
Reasons For Denying The Petition	9
I. The Decision Below Comports With The IDEA's Plain Language And Unwavering Congressional Intent	9
A. Congress Did Not Abrogate The Common-Law Ban On Lay Representation Of Another's Interests In Court When It Originally Enacted The IDEA	10

TABLE OF CONTENTS – Continued

Page

B. Congress Again Declined To Abrogate The Common-Law Rule When It Reauthorized The IDEA in 2004 14

II. Legitimate Policy Considerations Support Congress' Refusal To Abrogate The Common-Law Rule Under The IDEA 15

III. Petitioners' Alleged Square And Intractable Three-Way Circuit "Split" Is Illusory And Premature 19

A. There Is No Three-Way Split 19

B. Characterizing The Split Regarding Substantive IDEA Claims As Intractable Is Premature 23

IV. This Case Presents A Poor Vehicle For Certiorari 24

A. The Decision Below Did Not Create A Square And Intractable Conflict 24

B. Petitioners Have Not Been *Pro Se* Throughout The Majority Of These Proceedings 24

C. Other Less Procedurally And Factually Complex Cases Would Be More Appropriate For Certiorari 25

D. The Judgment Below Is Not Final 27

E. Petitioners Are Unlikely To Succeed On The Merits Of Their Appeal Regardless Of The Outcome Of This Petition 29

Conclusion 30

TABLE OF CONTENTS – Continued

Page

APPENDIX:

Appendix A
Court of Appeals Order
September 20, 2005 ..... 1b

Appendix B
Notice of Appearance of Counsel for Petitioners
in *Winkelman v. Parma City Sch. Dist.*,
Case No. 04-4159
(6th Cir. October 18, 2005) 5b

Appendix C
Petitioners' Supplemental Letter Brief
Winkelman v. Parma City Sch. Dist.,
Case No. 04-4159
(6th Cir. November 15, 2005) 7b

Appendix D
Respondent's Motion to Dismiss
Winkelman v. Parma City Sch. Dist.,
Case No. 04-3129 (N.D. Ohio 2004)
July 12, 2005 ..... 18b

Appendix E
Petitioners' Opposition to Motion to Dismiss
Winkelman v. Parma City Sch. Dist.,
Case No. 04-3129 (N.D. Ohio 2004)
July 20, 2005 ..... 33b

Appendix F
Respondent's Reply to Petitioners' Opposition
to Motion to Dismiss
Winkelman v. Parma City Sch. Dist.,
Case No. 04-3129 (N.D. Ohio 2004)
July 27, 2005 ..... 71b

TABLE OF AUTHORITIES

Page

FEDERAL CASES

American Constr. Co. v. Jacksonville, T. & K.W. Railway Co., 148 U.S. 372 (1893) 27

Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) 10

Avion v. Franklin County Prosecuting Atty's Office, 2005 U.S. Dist. LEXIS 11669 (S.D. Ohio June 14, 2005) 22

Bowen v. Massachusetts, 487 U.S. 879 (1988) 10

C.O. v. Portland Public Sch., 2005 U.S. Dist. LEXIS 39161 (D. Or. Dec. 22, 2005) 22, 23

Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005) ..... *passim*

Cheung v. Youth Orchestra Found., 906 F.2d 59 (2d Cir. 1990) 11, 14, 16

Church of Scientology of California v. United States, 506 U.S. 9 (1992) 29

Clinton v. City of New York, 524 U.S. 417 (1998) 27

Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 (3rd Cir. 1998) 12, 15, 16, 19, 21

Crawford v. Meyzeek Middle Sch., 2005 U.S. Dist. LEXIS 29410 (D. Ky. Nov. 17, 2005) 22

Dakota Cty v. Glidden, 113 U.S. 222 (1885) 29

Devine v. Indian River County Sch. Bd., 121 F.3d 576 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998) 4, 11

TABLE OF AUTHORITIES – Continued

Page

Dividock v. KCAD-FSU, 2005 U.S. Dist. LEXIS 33470 (D. Mich. Dec. 6, 2005) 22

Dividock v. KCAD-FSU, 2005 U.S. Dist. LEXIS 36605 (D. Mich. Aug. 30, 2005) 22

Doe v. Bd. of Educ. of Tullahoma City Schs., 9 F.3d 455 (6th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994) 30

Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990) 30

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 10

Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552 (6th Cir. 2000) 16

Green v. Cape Henlopen Sch. Dist., 2005 U.S. Dist. LEXIS 32268 (D. Del. Dec. 13, 2005) 22

Guajardo v. Luna, 432 F.2d 1324 (5th Cir. 1970) 11

Herrera-Venegas v. Sanchez-Rivera, 681 F.2d 41 (1st Cir. 1982) 10

Johns v. County of San Diego, 114 F.3d 874 (9th Cir. 1997) 11, 14

Land v. Dollar, 330 U.S. 731 (1947) 27

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 27

Maher v. Roe, 432 U.S. 464 (1977) 29

Maroni v. Pemi-Barker Reg'l School Dist., 346 F.3d 247 (1st Cir. 2003) 13, 19, 21, 23

Meeker v. Kercher, 782 F.2d 153 (10th Cir. 1986) 11

Mistretta v. United States, 488 U.S. 361 (1989) 27

TABLE OF AUTHORITIES – Continued

Page

Mosley v. Bd. of Educ., 434 F.3d 527 (7th Cir. 2006) 19, 21, 22, 23

N.L.R.B. v. Mexia Textile Mills, Inc., 339 U.S. 563 (1950) 29

Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147 (7th Cir. 2001) 14

Osei-Afriyie v. Medical College of Pa., 937 F.2d 876 (3rd Cir. 1991) 11, 14, 17

Ryan v. Shawnee Mission U.S.D. 512, 2006 U.S. Dist. LEXIS 7779 (D. Kan. Feb. 28, 2006) 22

Schaffer v. Weast, 126 S. Ct. 528 (2005) 11, 13

United States v. Nat'l Treasury Employees, 513 U.S. 454 (1995) 10

United States v. Texas, 507 U.S. 529 (1993) 10

United States v. United Mine Workers, 330 U.S. 258 (1947) 27

Virginia Military Inst. v. United States, 508 U.S. 946 (1993) 27

Wenger v. Canastota Centr. Sch. Dist., 146 F.3d 123 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999) 4, 19, 20, 22

STATUTES AND REGULATIONS

20 U.S.C. § 1400 *et seq.* 1

20 U.S.C. § 1400(d)(1)(A) 20

20 U.S.C. § 1415(a) 20

20 U.S.C. § 1415(b) 20

TABLE OF AUTHORITIES – Continued

Page

20 U.S.C. § 1415(b)(3) 20

20 U.S.C. § 1415(f)(1) 1, 14, 12, 20

20 U.S.C. § 1415(f)(3)(E)(ii) 22

20 U.S.C. § 1415(h) 1, 4, 12

20 U.S.C. § 1415(i)(3)(b) 18

20 U.S.C. § 1415(i)(2) 6

20 U.S.C. § 1415(i)(2)(A) 1, 4, 12, 13, 15

20 U.S.C. § 1415(j) 13

28 U.S.C. § 1915(e) 18

34 C.F.R. § 300.507(a)(3) 18

34 C.F.R. § 303.422 1

34 C.F.R. § 303.422(b)(2) 1, 12

MISCELLANEOUS

Docket in *Russell v. Dep't of Educ., State of Hawaii*, No. 04-15482 (9th Cir. Jul. 16, 2004) 26

Docket in *Russell v. Dep't of Educ., State of Hawaii*, No. 03-00654 (Hawaii 2003) 26

Docket in *Sand v. Milwaukee Public Sch.*, No. 03-C-1014 (E.D. Wis. Sep. 20, 2005) 26

Docket in *Winkelman v. Parma City Sch. Dist.*, No. 04-4159 (6th Cir. 2004) 25

S. Rep. No. 108-185, 108th Cong., 1st Sess. (2003) 5, 15

TABLE OF AUTHORITIES – Continued

Page

RULES

FED. R. CIV. P. 17(c) 13, 14
FED. R. EVID. 201(b)(2) ..... *passim*
SUPREME COURT RULE 10 21
SUPREME COURT RULE 11 27
SUPREME COURT RULE 14(i)(ii) 9
SUPREME COURT RULE 29.6 ii

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

In addition to the opinion and order included in the Petition, Respondent includes the September 20, 2005 Order of the United States Court of Appeals for the Sixth Circuit in related case *Winkelman v. Parma City Sch. Dist.*, Case No. 04-4159 (6th Cir. 2004) as the court below referenced this order in the decision that Petitioners ask this Court to review. This order, (Respt. App., *infra.*, 1b-4b), is unreported and is available at 2005 U.S. App. LEXIS 20355.

STATUTORY PROVISIONS INVOLVED

In addition to Section 1415(i)(2)(A) of the Individuals With Disabilities In Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, cited by Petitioners, Section 1415(f)(1), Section 1415(h) and 34 C.F.R. § 303.422(b)(2) are also at issue. Section 1415(f)(1) provides "parents . . . an opportunity for an impartial due process hearing" while Section 1415(h) and 34 C.F.R. § 303.422(b)(2) provide parents at state administrative due process hearings the "right to be accompanied and advised by counsel and by individuals with special knowledge or training * * * [and] present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(h); 34 C.F.R. § 303.422(b)(2).

INTRODUCTION

Once stripped of the sympathies and emotions that exist in any special education dispute, this case is a textbook example of a matter that does not warrant this Court's review as it merely involves application of well-settled law. In an unpublished interlocutory decision, the Sixth Circuit

adhered to the customary rule that non-attorneys may not represent the interests of another in court, concluding non-attorney parents may not prosecute their child's substantive IDEA[1] claims in court without legal representation.

There is no basis for this Court to intervene and judicially legislate an exception to this time-honored rule into the IDEA. First, Congress has repeatedly declined to abrogate the venerable common-law principle that non-attorneys cannot represent the interests of another in court. Indeed, while Congress provided non-attorney parents the express right to prosecute their child's IDEA actions during state ***administrative*** proceedings, as recently as the 2004 Reauthorization of the IDEA, it has declined the opportunity to provide a corresponding right during ***judicial*** review. It is well-settled that absent an express, clear Congressional intent to the contrary, common-law principles apply to statutes. Thus, the "party aggrieved" language relied upon by Petitioners merely allows non-attorney parents to bring a suit through counsel on their child's behalf. It does not give parents the right to act as the legal representative in that suit. As the decision below does not threaten the effective enforcement of the IDEA, but instead remains faithful to the IDEA's plain language and Congressional intent, the petition should be denied.

Second, legitimate policy considerations support Congress' refusal to abrogate the common-law rule against lay representation of another's interests in court. Not only is there a strong state interest in regulating the practice of

---

[1] In 2004, Congress amended and reauthorized the IDEA, renaming it the Individuals With Disabilities In Education Improvement Act ("IDEIA"). Since Petitioners refer to IDEA, Respondent will do likewise.

law, minor children with disabilities cannot make an informed choice to assume the risk of proceeding without counsel.

Third, Petitioners' alleged square and irreconcilable 1-4-1 split is illusory and premature. The Sixth Circuit joined four other circuits in finding that parents may not prosecute their child's substantive IDEA claims in court without an attorney. Petitioners' allegation that the Sixth Circuit created a three-way split by barring parents from proceeding *pro se* on their own procedural claims paints the picture with too broad a brush. The issue of whether a parent can proceed *pro se* with his/her own procedural claims was never presented to the Sixth Circuit – nor is it the focus here. Rather, the issue expressly before the Sixth Circuit was whether non-attorney parents could represent their children in court. Thus, Petitioners' alleged 1-4-1 split is illusory.

Nor is the split "intractable." In light of Congress' recent decision not to enact a proposed provision allowing parents to represent their child's legal claims in court, the lone circuit taking this position may reconsider given Congress' considered refusal to amend the IDEA on this point. Therefore, a square and irreconcilable split does not exist and this Court should deny the petition.

Finally, this case is not an appropriate vehicle for certiorari. For the majority of the proceedings, Petitioners have not been *pro se* but instead have been represented by counsel. They have also complied with a Sixth Circuit order to obtain counsel in a related appeal. Further, other less procedurally and factually complex cases resulting in a final, as opposed to an interlocutory, order would be a better vehicle for certiorari. Moreover, as Respondent has prevailed at all levels in this case, Petitioners are unlikely

to succeed on the merits of their appeal before the Sixth Circuit regardless of how this Court resolves the *pro se* representation issue.

For these reasons, as it has done with previous petitions on the same issue, *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998); *Wenger v. Canastota Centr. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999), this Court should deny the petition.

STATEMENT OF THE CASE

A. Statutory Framework And Legislative History.

1. The IDEA Does Not Give Parents The Right To Legally Represent Their Child In Court.

As Petitioners note, the statutory framework of the IDEA provides parents with significant procedural protections to ensure their full participation "in the IEP process" and "at every stage of the administrative process." Pet. at 3. (citations omitted). One procedural protection is the express right for a parent to act as their child's legal representative during state administrative proceedings. 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(h). The IDEA does not extend this same right to parents during the judicial review process. 20 U.S.C. § 1415(i)(2)(A). This exclusion comports with the venerable common-law rule that non-attorneys may not represent the interests of another in court.

2. Congress Recently Refused To Enact A Proposed Amendment Providing Parents The Right To Prosecute Judicial IDEA Actions On Behalf Of Their Child.

In 2003, the Senate Committee on Health, Education, Labor and Pensions reviewed the IDEA and considered various amendments as part of the reauthorization process. *See generally* S. Rep. No. 108-185, 108th Cong., 1st Sess. (2003). The committee issued a report recommending a proposed amendment regarding the very issue presented by Petitioners:

> It is unquestioned that parents have the right to bring a [due process] complaint and participate in a due process hearing without an attorney.
>
> However, there has been disagreement as to whether a parent may, in effect, 'represent' their child in a civil action that results from an appeal of a due process hearing. ***The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have decided this issue based upon a distinction between procedural and substantive claims brought by a parent.***
>
> ***Both Federal and State laws generally prevent a non-attorney parent from representing his or her child in a court proceeding, as these laws provide that a person can only represent himself or herself, and not proceed on behalf of their minor child. Moreover, it is well-settled law that a minor is disqualified from representing himself or herself in a civil action.***
>
> * * *
>
> [T]he committee believes that parents have a right to represent their child in court, without a lawyer, for purposes of IDEA law, regardless of

> whether their claims involve procedural or substantive issues. ***Therefore, the committee has amended section 615(i)(2) to clarify that a parent of a child with a disability may represent the child in any action under this part in State or Federal court, without the assistance of an attorney.***

Id. at 41-42 (emphasis added).

Yet, despite knowledge of the conflict among the courts, and the Committee's recommendation, Congress chose not to enact the proposed amendment which would have allowed parents to prosecute IDEA claims in court. Thus, the IDEA still does not include any express provision that abrogates the common-law principle prohibiting lay representation of another in court. 20 U.S.C. § 1415(i)(2).

B. Factual And Procedural Background.

Contrary to Petitioners' claim that they cannot afford an attorney, they have been represented during the bulk of these complex proceedings, including during the administrative proceedings, before the District Court, and on a related appeal at the Sixth Circuit.

The fundamental underlying dispute arises from an alleged substantive error regarding Jacob Winkelman's least restrictive environment ("LRE"). Pet. App. 5a. On June 5, 2003, Petitioners filed a request for due process, alleging the Individualized Education Plan ("IEP") offered by Respondent did not offer Jacob a free appropriate public education ("FAPE"). *Id.* Prior to the hearing, the Impartial Hearing Officer (IHO) held that Jacob's stay-put placement during the pendency of the hearing was the Achievement Center for Children ("Achievement Center"). *Id.* Petitioners did not place Jacob at the Achievement Center but instead unilaterally placed him at the private

Monarch School prior to the start of the 2003-04 school year. *Id.*

On February 25, 2004, after conducting a due process hearing, the IHO issued a 56-page decision finding the program offered by Respondent provided Jacob a FAPE. *Id.* 6a. The Petitioners appealed this decision to a State Level Review Officer ("SLRO"). After reviewing the extensive record, on June 2, 2004, the SLRO concluded the IHO did not err in finding Respondent offered Jacob a FAPE. *Id.* Petitioners were represented by counsel throughout the state administrative proceedings. Pet. at 6.

On July 15, 2004, Petitioners, *pro se*, appealed the SLRO's decision to the U.S. District Court for the Northern District of Ohio. *See* Compl. at 10; Pet. App. 6a. On August 23, 2004, Petitioners filed a Motion for Temporary Restraining Order asking the District Court to issue an order making Monarch School Jacob's stay-put placement during the pendency of the court proceedings. Pet. Mot. for TRO 1, 18. The District Court denied the motion on August 24, 2004. *See* Aug. 24, 2004 Order. On September 13, 2004, Petitioners filed a Motion for Reconsideration requesting that the District Court overturn its August 24, 2004 stay-put ruling. Pet. Mot. Reconsider. On September 23, 2004, while their Motion for Reconsideration was pending, Petitioners, *pro se*, filed an interlocutory appeal of the District Court's denial of their request for a stay-put injunction. *See* Not. App. in *Winkelman v. Parma City Sch. Dist.*, Case No. 04-4159 (6th Cir. 2004) (hereinafter "Case No. 04-4159").[2] That same day, Petitioners filed an "Emergency

[2] As the docket in Petitioners' related appeal is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," this Court may take judicial notice of it. FED. R. EVID. 201(b)(2). In the interest of brevity, Respondent will not

(Continued on following page)

Motion for Injunction Pending Appeal" requesting that the Sixth Circuit "stay" the District Court's August 24, 2004 Order and make the Achievement Center Jacob's stay-put placement. Pet. Em. Mot. Inj. 1, Case No. 04-4159.[3] The next day, Petitioners filed an "Emergency Motion for a Temporary Injunction Pending Adjudication of Request for Permanent Injunction" requesting that the Sixth Circuit issue an order placing Jacob at the Achievement Center. Pet. Em. Mot. Temp. Inj. 4, Case No. 04-4159.[4] Both "emergency" motions were denied. *See* Nov. 4, 2004 Order and March 3, 2005 Order, Case No. 04-4159.[5]

While the proceedings in related Case No. 04-4159 were ongoing, Petitioners obtained counsel to represent them in the District Court proceedings in the instant case and in March 2005, the parties briefed the substantive merits. *See* Pet. Mot. for SJ 16-17; Pet. App. 6a. On June 2, 2005, Judge Manos resolved the underlying dispute finding that the state-appointed hearing officers did not err in concluding Respondent had offered Jacob a FAPE and denied Petitioners' request for reimbursement for Jacob's unilateral placement at Monarch School. Pet. App. 23a. On July 1, 2005, proceeding *pro se*, Petitioners appealed Judge Manos' decision to the Sixth Circuit Court of Appeals. *See* Notice of Appeal.

On September 20, 2005, pursuant to its decision in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), the Sixth Circuit ordered Petitioners to obtain counsel for Jacob in their related appeal on the stay-put

---

continue to recite the text of the rule each time it cites to the docket of this case but instead will merely cite to the judicial notice rule.

[3] FED. R. EVID. 201(b)(2).

[4] *Id.*

[5] *Id.*

issue, Case No. 04-4159, within 30 days. Respt. App., *infra*, 1b-4b.[6] On October 18, 2005, Petitioners retained Jean-Claude André, their counsel in the instant matter, to represent them in Case No. 04-4159. Respt. App. 5b-6b.[7] On January 25, 2006, after supplemental briefing and hearing oral arguments from counsel for both parties, the Sixth Circuit denied Petitioners' appeal regarding the stay-put issue. *See* Jan. 25, 2006 Order, Case No. 04-4159.[8]

On November 4, 2005, the Sixth Circuit ordered Petitioners to obtain counsel for Jacob in the instant case within 30 days. Pet. App. 1a-2a. In response, Petitioners filed a Motion for Stay Pending Certiorari with the Sixth Circuit which was denied on December 1, 2005. Petitioners then filed, through counsel, an Application for Stay Pending Certiorari to this Court which was granted on December 2, 2005. This petition followed.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW COMPORTS WITH THE IDEA'S PLAIN LANGUAGE AND UNWAVERING CONGRESSIONAL INTENT.

This Court should reject the Petition as it asks this Court to effectively preempt the Congressional legislative process and legislate changes to the IDEA from the bench. Not only does this Court have an "obligation to avoid

---

[6] As the court below referenced this September 20, 2005 order in the decision that Petitioners ask this Court to review, Respondent believes this decision is part of the record. Alternatively, it is properly appended hereto pursuant to Supreme Court Rule 14(i)(ii), or this Court may take judicial notice of it pursuant to Federal Rule of Evidence 201(b)(2).

[7] FED. R. EVID. 201(b)(2).

[8] *Id.*

judicial legislation," *United States v. Nat'l Treasury Employees*, 513 U.S. 454, 479 (1995), there is no reason for this Court to intervene. Congress has repeatedly decided to uphold the common-law ban on lay representation in court in IDEA actions. Therefore, in adhering to the well-settled prohibition against lay representation, the Sixth Circuit, along with four other circuits, remained faithful to the plain language of the IDEA and Congressional intent.

A. Congress Did Not Abrogate The Common-Law Ban On Lay Representation Of Another's Interests In Court When It Originally Enacted The IDEA.

Consistent with the IDEA and Congressional intent, the Sixth Circuit and four other circuits properly applied the customary and long-standing rule that non-attorneys may not represent the interests of another in court under the IDEA. The "well-settled presumption" is that "Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-185 (1988). In fact, "courts may take it as a given that Congress has legislated with an expectation that the [common-law] principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Further, "to [show that Congress intended to] abrogate a common-law principle, the statute must '***speak directly***' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529 (1993) (emphasis added).

Here, it is well-settled that a non-attorney may not represent the interests of another in court. *See e.g., Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982) (noting that federal courts have consistently

rejected attempts at third-party lay representation); *Guajardo v. Luna*, 432 F.2d 1324, 1325 (5th Cir. 1970). This prohibition extends to non-lawyer parents representing their minor children in court. *See Devine*, 121 F.3d at 581-82; *Johns v. County of San Diego*, 114 F.3d 874, 876-877 (9th Cir. 1997) (compiling cases holding that non-attorney parents may not proceed *pro se* on behalf of their children); *Osei-Afriyie v. Medical College of Pa.*, 937 F.2d 876, 883 (3rd Cir. 1991); *Cheung v. Youth Orchestra Found.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986). Congress did not deviate from the default rule against lay representation in the IDEA as the statute fails to "speak directly" to the issue. Instead, the plain text of the IDEA speaks directly to the issue of non-attorney parents representing their child's interests only in administrative proceedings – not judicial proceedings.

As this Court recently explained in applying the default burden of persuasion rule to the IDEA:

> The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. . . . Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.

Schaffer v. Weast, 126 S. Ct. 528, 534-35 (2005). As in *Schaffer*, there is no reason to believe Congress intended that the IDEA deviate from the default rule banning non-attorney representation of another's interests in court. To the contrary, although Congress included a provision allowing parents to proceed *pro se* at administrative hearings, it rejected a proposed amendment that would have included a corresponding right to represent their

child's interest in court. 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(h); 20 U.S.C. § 1415(i)(2)(A). Under the canon of *expressio unius est exclusio alterius*, Congress' considered refusal to include this provision implies that non-attorney parents cannot represent their children *pro se* in court. As the Sixth Circuit explained in *Cavanaugh*:

> The Cavanaughs can point to no language in the IDEA that abrogates the common law rule that non-lawyers may not represent litigants in court. To the contrary, the language of the IDEA evidences a congressional intent to prohibit non-lawyer parents from representing their minor children in suits brought under its provisions. The IDEA explicitly grants parents the right to a due process hearing as part of the administrative proceedings provided for by the statute, and the regulations provide to the parents the right to present evidence and examine witnesses on behalf of the child in such a proceeding. 20 U.S.C. § 1415(f)(1); 34 C.F.R. § 303.422(b)(2). In stark contrast, the provision of the IDEA granting "[a]ny party aggrieved" access to the federal courts, 20 U.S.C. § 1415(i)(2)(A), makes no mention of parents whatsoever. Applying the canon of *expressio unius est exclusio alterius*, which says that the mention of one thing implies the exclusion of another, . . . we conclude that the IDEA does not grant parents the right to represent their child in federal court.

Cavanaugh, 409 F.3d at 756 (internal citation omitted). *See also Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3rd Cir. 1998) ("That it did not also carve out an exception to permit parents to represent their child in federal proceedings suggests that Congress only intended to let parents represent their children in administrative proceedings.").

Again, this Court's rationale in the recent *Schaffer* decision is instructive:

> Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA . . . includes a so-called "stay-put" provision, which requires a child to remain in his or her "then-current educational placement" during the pendency of an IDEA hearing. § 1415(j). Congress could have required that a child be given the educational placement that a parent requested during a dispute, but it did no such thing.

Shaffer, 126 S. Ct. at 536. Likewise, Congress could have expressly allowed non-lawyer parents to proceed *pro se* on behalf of their children in court. Yet despite the opportunity to do so mere months after acknowledging a judicial split, Congress did no such thing. The fact that it did not compels the conclusion that Congress did not intend to abrogate the common-law rule and give parents the right to prosecute their child's IDEA actions in court without an attorney.

Petitioners' reliance upon the IDEA's "party aggrieved" language and the First Circuit's rationale in *Maroni v. Pemi-Barker Reg'l School District*, 346 F.3d 247 (1st Cir. 2003) is misplaced. According to the *Maroni* court, because the IDEA allows "any party aggrieved" by a final administrative decision to "bring a civil action"[9] in federal court, non-attorney parents may prosecute their child's IDEA claims *pro se*. *Maroni*, 346 F.3d at 250. This interpretation runs *contra* to the majority interpretation of similar language contained in Rule 17(c) of the Federal Rules of Civil Procedure. Rule 17(c) provides that "whenever an

---

[9] 20 U.S.C. § 1415(i)(2)(A).

infant or incompetent person has a representative, such as a general guardian, . . . the representative may sue or defend on behalf of the infant or incompetent person." FED. R. CIV. P. 17(c). As numerous courts have concluded, this rule allows the guardian to sue on the incompetent person's behalf; it does not allow a non-attorney guardian to represent the child in court. *See Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147 (7th Cir. 2001) (non-custodial parent could not bring suit on behalf of himself and his son, acting as the son's next friend, because parent "was free to represent himself, but as a non-lawyer he has no authority to appear as [son's] legal representative"); *Johns*, 114 F.3d at 876-877; *Devine*, 121 F.3d at 581-82; *Osei-Afriyie*, 937 F.2d at 882; *Cheung*, 906 F.2d 59; *Meeker*, 782 F.2d at 154. Likewise, the IDEA's "party aggrieved" language does not give non-lawyer parents the right to represent their child in court. Rather, it allows them to obtain counsel to seek judicial review of state administrative proceedings.

Therefore, this Court should reject Petitioners' call to usurp the Congressional legislative process.

B. Congress Again Declined To Abrogate The Common-Law Rule When It Reauthorized The IDEA In 2004.

The fact that Congress recently considered this issue ***but declined to amend the IDEA to allow non-attorney parents to represent their children in court*** underscores the fact that there is no reason for this Court to intervene and judicially legislate an amendment that Congress expressly rejected. As Petitioners point out, the Senate Committee charged with studying the IDEA "devoted significant attention to the issue" in 2003 when it considered the reauthorization of the IDEA. Pet. at 16. As

discussed *supra*, the Committee recognized that some courts found that the plain language of the IDEA did not allow non-lawyer parents to represent their child without an attorney in court. S. Rep. No. 108-185, 108th Cong., 1st Sess. 41-42 (2003). In response, the Committee drafted a provision modifying the IDEA to expressly include such a right. *Id.* Yet, when it amended the IDEA less than a year later, Congress did not embrace the proposed amendment.[10] Given the Committee's express recognition that courts were interpreting the existing language as not allowing parents to proceed *pro se* in court, if Congress intended for parents to have such a right, it would have enacted the proposed amendment. As Congress did not enact the amendment, this Court's intervention is not warranted.

II. LEGITIMATE POLICY CONSIDERATIONS SUPPORT CONGRESS' REFUSAL TO ABROGATE THE COMMON-LAW RULE UNDER THE IDEA.

Substituting judicial legislation for the Congressional legislative process is also not warranted as legitimate policy considerations support the rule against non-attorney legal representation of minor children in court. As the *Collinsgru* court noted, there is a strong state interest in regulating the practice of law as well as preventing vexatious claims:

> First, there is a strong state interest in regulating the practice of law. Requiring a minimum level of competence protects not only the party

[10] Significantly, as before, Section 1415(i)(2)(A) of the reauthorized IDEA still fails to grant non-attorney parents a right to proceed *pro se* on behalf of their children in judicial proceedings. 20 U.S.C. § 1415(i)(2)(A).

> that is being represented but also his or her adversaries and the courts from poorly drafted, inarticulate, or vexatious claims. . . . The second consideration is the importance of the rights at issue during litigation and the final nature of any adjudication on the merits. Not only is a licensed attorney likely to be more skilled in the practice of law, but he or she is also subject to ethical responsibilities and obligations that a lay person is not.

Collinsgru, 161 F.3d at 231 (citations omitted). A review of the docket in these proceedings supports the interests expressed in *Collinsgru*.

Another policy consideration is a child's inability to make an informed choice to assume the risk of proceeding without counsel. When a competent adult chooses to proceed without counsel, the adult has knowingly assumed the risk of mistakes associated with untrained representation. *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000) ("In particular, a willfully unrepresented plaintiff volitionally assumes the risks and accepts the hazards, which accompany self representation."). However, the same cannot be said for Jacob and other minor disabled children. As the Second Circuit noted:

> The choice to appear *pro se* is not a true choice for minors who under state law, cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect. . . . It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

Cheung, 906 F.2d at 61 (internal citations omitted).

Simply put, love and passionate advocacy for a child cannot substitute for appropriate legal training in a court of law. *Osei-Afriyie v. Medical College of Pennsylvania* particularly illustrates the risks associated with minor children being represented by well-intentioned non-attorney parents. In *Osei-Afriyie,* a father brought numerous tort claims on behalf of himself and his two daughters relating to the daughters' medical treatment for malaria. *Osei-Afriyie*, 937 F.2d 876. On appeal after a defense verdict, the Third Circuit noted that the district court had erroneously failed to instruct the jury on equitable tolling and directly attributed this error to Osei-Afriyie's lack of experience and legal training. *Osei-Afriyie*, 937 F.2d at 882. According to the court, "Osei-Afriyie is a well-educated economist. He is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance ever to have any of their claims heard." *Id.* The appellate court ultimately remanded the case to the district court and vacated the judgments against the children because the parent, as a non-lawyer, "was not entitled to represent his children in place of an attorney." *Id.* at 883.

These policy considerations are especially important in IDEA cases due to the procedural and substantive complexity of this area of the law. The fact that the IDEA allows parents to represent their children *pro se* during administrative proceedings does not obviate this risk. Court proceedings are more complex and formal than state administrative proceedings. For example, the Rules of Civil Procedure and Evidence are often applied loosely or not at all in administrative hearings.

The alleged difficulty in obtaining counsel to prosecute IDEA disputes does not overcome the risks associated with inadequate representation by non-lawyer parents. First, Petitioners paint an incomplete picture regarding legal

options available to parents with limited financial resources. While Petitioners are quick to note that 36% of the children receiving special education services live in households with incomes of $25,000 or less, Pet. at 15, they fail to recognize that these children may qualify for court-appointed counsel. *See* 28 U.S.C. § 1915(e). Additionally, low-cost[11] or *pro bono* legal services may be available. Indeed, Petitioners successfully obtained *pro bono* counsel both for the instant petition as well as the supplemental merit briefing in their related Sixth Circuit appeal, Case No. 04-4159. Respt. App. 5b-7b, 16b-17b.[12] They also were able to obtain legal representation for the bulk of the District Court proceedings below. *See generally* Docket in *Winkelman v. Parma City Sch. Dist.*, Case No. 1:04CV-1329 (N.D. Ohio 2004). Notably, Petitioners have not alleged that they attempted to obtain counsel and were turned down. Therefore, Petitioners' dire prediction that the decision below will allow school districts that lose at the administrative level to obtain *de facto* reversal if they seek judicial review against a parent of limited financial means is pure speculation. The IDEA also allows for reimbursement of attorney's fees to prevailing parents. 20 U.S.C. § 1415(i)(3)(b).

Finally, while Petitioners' claim about the alleged plight of parents of limited financial resources is sympathetic, it is the responsibility of Congress, not this Court, to abrogate the common-law rule barring lay representation. Petitioners fail to point to any IDEA provision that "directly speaks" to this issue and abrogates the prohibition

---

[11] Congress apparently recognized parents may have limited financial resources and expressly required school districts to provide parents involved in due process proceedings with a list of free or low-cost legal services available in the area. 34 C.F.R. § 300.507(a)(3).

[12] FED. R. EVID. 201(b)(2).

on non-lawyers representing the interests of another in court. Therefore, certiorari should be denied.

III. PETITIONERS' ALLEGED SQUARE AND INTRACTABLE THREE-WAY CIRCUIT "SPLIT" IS ILLUSORY AND PREMATURE.

A. There Is No Three-Way Split.

Petitioners mischaracterize the circuits as being in a "well-recognized 1-4-1 split" regarding whether and under what circumstances non-lawyer parents may prosecute an IDEA case in court. Respondent agrees that five circuits have found that non-attorney parents may not represent their child in court on an IDEA action alleging violations of ***substantive*** rights. *See Mosley v. Bd. of Educ.*, 434 F.3d 527, 532 (7th Cir. 2006); *Cavanaugh*, 409 F.3d 753; *Collinsgru*, 161 F.3d at 231; *Wenger*, 146 F.3d at 124-26; *Devine*, 121 F.3d at 582. Further, one lone circuit has found that parents may proceed *pro se* on behalf of their child in an IDEA action regardless of whether substantive or procedural violations are alleged. *Maroni*, 346 F.3d at 249-50.

However, Petitioners read both the Sixth Circuit's decision in *Cavanaugh v. Cardinal Local School District* and in the instant case[13] too broadly when they assert that these decisions create a three-way split by imposing an absolute bar to parents' ability to bring an IDEA action *pro se* in court. In *Cavanaugh*, no procedural violations were at issue.[14] Instead, the *Cavanaugh* court found that parents

[13] The decision below applied the *Cavanaugh* precedent. This Court's review was not sought in *Cavanaugh*.

[14] The *Cavanaugh* court framed the issue as follows: "The Cavanaughs, who are not lawyers, argue that their appeal is properly before this court because: 1) they may represent Kyle's rights under the IDEA

(Continued on following page)

cannot proceed *pro se* on a joint substantive rights theory. As the court explained:

> We are mindful that the IDEA does grant parents of disabled students a narrow set of procedural rights, *see Wenger*, 146 F.3d at 126; *Collinsgru*, 161 F.3d at 233, which include a parent's right to participate in meetings that evaluate the child's performance, 20 U.S.C. § 1415(b); to receive prior written notice whenever the agency proposes a change to the IEP, 20 U.S.C. § 1415(b)(3); and to participate in due process hearings. 20 U.S.C. § 1415(f)(1). However, these procedural rights exist only to ensure that the child's substantive right to a FAPE is protected and do not confer on the parents a vicarious, ***substantive*** right to a ***FAPE.***
>
> * * *
>
> Adopting instead the reasoning of *Collinsgru*, 161 F.3d at 232-37, we hold that the right of [sic] disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents. Therefore, any right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to receive a FAPE, and wholly dependent upon the Cavanaughs' proceeding, through counsel, with their appeal on Kyle's behalf.

Cavanaugh, 409 F.3d at 757 (emphasis added). The *Cavanaugh* court's reference to adopting the *Collinsgru* court's

---

and 2) the IDEA grants them a cognizable right of their own to a ***FAPE*** for their son." *Cavanaugh*, 409 F.3d at 755 (emphasis added). The right to a FAPE is not an enumerated procedural right given to parents under the IDEA but instead is one of the fundamental substantive rights provided by the IDEA. 20 U.S.C. § 1400(d)(1)(A) (FAPE substantive right); 20 U.S.C. § 1415(a) (procedural rights).

reasoning suggests its ruling was limited to substantive IDEA rights.[15]

Likewise, Mr. and Mrs. Winkelmans' right to proceed *pro se* on their procedural claims in the instant proceedings was never expressly before the Sixth Circuit. Rather, the focus of the parties was whether Mr. and Mrs. Winkelman, as non-lawyers, could represent Jacob in court.[16] *See* Pet. App. 1a-2a; Respt. App. 18b, 20b, 22b-23b, 33b-36b, 71b-75b. Indeed, the Sixth Circuit made no mention of any procedural rights being asserted by Petitioners. Instead, the appellate court stated, "As established in this Court's order filed on September 20, 2005, in related appeal No. 04-4159, Jeff and Sandee Winkelman are not permitted to represent their child in federal court nor can they pursue their own IDEA claim *pro se*." Pet. App. 1a-2a. The September 20, 2005 Order referenced by the Sixth Circuit did not expressly address procedural IDEA claims as it was issued in a related proceeding where only a substantive IDEA claim regarding Jacob's stay-put placement was

---

[15] Other courts have interpreted the *Collinsgru* decision as allowing parents to proceed *pro se* on procedural claims but not substantive claims. *See, e.g.*, *Mosley*, 434 F.3d at 532; *Maroni*, 346 F.3d at 249.

[16] Even if Petitioners' alleged procedural violations had been expressly presented, they are intertwined with substantive IDEA claims. Specifically, their allegations that Respondent predetermined the IEP and the IHO issued an untimely decision fundamentally relate to Jacob's substantive right to a FAPE. Further, assuming *arguendo* that the Sixth Circuit erroneously concluded that Petitioners were only bringing substantive IDEA claims, this does not provide a basis for this Court's intervention as it is well-settled that this Court does not grant certiorari to correct erroneous factual findings. SUPREME COURT RULE 10 (2005).

raised.[17] Respt. App. 2b-4b. The appellate court's reference to its September 20, 2005 Order, and the fact that the Winkelmans' right to bring their own procedural claims was not expressly addressed, suggests that Mr. and Mrs. Winkelman were precluded from pursuing their own substantive IDEA claims – not their procedural claims. Thus, the decisions in *Winkelman* and *Cavanaugh* did not clearly create a three-way split.[18]

Further, contrary to Petitioners' assertion that the alleged 1-4-1 split is "well-recognized," no court appears to have expressly interpreted *Cavanaugh* or *Winkelman* as imposing an absolute bar to *pro se* representation.[19] In fact, the cases cited by Petitioners fail to mention the 1-4-1 split allegedly created by the Sixth Circuit. Indeed, the *Mosley*

---

[17] In that Order, the Sixth Circuit stated that the *Cavanaugh* panel "concluded that parents cannot pursue their own substantive IDEA claim *pro se*." Respt. App. 3b.

[18] Even if the Sixth Circuit's rulings did preclude non-attorney parents from prosecuting their own procedural claims *pro se*, this ruling is of no practical consequence as parents alleging procedural violations may only recover under the IDEA if they show the procedural violation deprived the child of the substantive right to a FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii). Therefore, a parent's procedural rights and their child's substantive right to a FAPE are inextricably intertwined.

[19] At the time this brief was printed, no cases citing these two decisions expressly interpreted them in this manner. *See Ryan v. Shawnee Mission U.S.D. 512*, 2006 U.S. Dist. LEXIS 7779 (D. Kan. Feb. 28, 2006) (unreported); *C.O. v. Portland Pub. Sch.*, 2005 U.S. Dist. LEXIS 39161, *23-27 (D. Or. Dec. 22, 2005) (unreported); *Green v. Cape Henlopen Sch. Dist.*, 2005 U.S. Dist. LEXIS 32268 (D. Del. Dec. 13, 2005) (unreported); *Dividock v. KCAD-FSU*, 2005 U.S. Dist. LEXIS 33470 (D. Mich. Dec. 6, 2005) (unreported); *Crawford v. Meyzeek Middle Sch.*, 2005 U.S. Dist. LEXIS 29410 (D. Ky. Nov. 17, 2005) (unreported); *Dividock v. KCAD-FSU*, 2005 U.S. Dist. LEXIS 36605 (D. Mich. Aug. 30, 2005) (unreported); *Avion v. Franklin County Prosecuting Atty's Office*, 2005 U.S. Dist. LEXIS 11669 (S.D. Ohio June 14, 2005) (unreported).

court never addressed *Cavanaugh* or *Winkelman* but instead merely stated, "Most of our sister circuits take the position that the IDEA thus confers different rights on children and parents: both substantive and procedural rights for the child, and procedural rights only for the parents." *Mosley*, 434 F.3d at 532. Likewise, the *C.O.* court did not reference the claimed "well-recognized" 1-4-1 split, but instead noted that the First Circuit is the only circuit to embrace the "party aggrieved" theory. *C.O. v. Portland Pub. Sch.*, 2005 U.S. Dist. LEXIS 39161, *23-27 (D. Or. Dec. 22, 2005) (unreported).

In sum, the Sixth Circuit's decisions in *Cavanaugh* and *Winkelman* do not clearly preclude parents from proceeding *pro se* on their own procedural IDEA claims. Thus, these decisions do not create a square and irreconcilable three-way conflict.

B. Characterizing The Split Regarding Substantive IDEA Claims As Intractable Is Premature.

Although a split exists as to whether non-attorney parents may bring substantive IDEA claims *pro se* on behalf of their children in court, it is too early to characterize the split as intractable. The lone circuit to find that non-lawyer parents may always proceed without an attorney in a judicial IDEA action did so in a single ruling which has not been subsequently applied. *Maroni*, 346 F.3d at 249-50. Further, this circuit has not addressed the issue since Congress rejected a proposed amendment to the 2004 Reauthorized IDEA that would have permitted such representation. Given that Congress was aware of the split among the courts and did not adopt the First Circuit's position, the First Circuit may reconsider its

position in a future case. Consequently, it is premature to claim that an intractable split exists.

Thus, this Court's intervention is not warranted at this time as there is no evidence of an irreconcilable or intractable split among the Circuits.

IV. THIS CASE PRESENTS A POOR VEHICLE FOR CERTIORARI.

Assuming *arguendo* that the *pro se* representation issue is appropriate for this Court's review, this case is not a proper vehicle for certiorari.

A. The Decision Below Did Not Create A Square And Intractable Conflict.

First, as discussed *supra*, the ability of a parent to proceed *pro se* on procedural violations was neither squarely presented nor resolved by the court below. Further, even if Petitioners' procedural violations had been squarely presented, they are intertwined with substantive IDEA claims and do not provide a good vehicle for certiorari. Likewise, to the extent a square conflict exists regarding a non-attorney parent's ability to prosecute a substantive IDEA claim for their child in court, it is too early to proclaim that the split is intractable. Therefore, this case is not an appropriate vehicle to resolve the question presented.

B. Petitioners Have Not Been *Pro Se* Throughout The Majority Of These Proceedings.

This case is also a poor vehicle to resolve the *pro se* question because Petitioners have not been *pro se* throughout all the proceedings. To the contrary, they were represented by an attorney at all levels of the state due

process proceedings and administrative review. Pet. at 6. Additionally, they were represented by an attorney at various times throughout the judicial proceedings, including during the briefing on the merits before the District Court. Pet. Mot. SJ 1, 18. Further, they were represented by counsel, *pro bono*, in the supplemental briefing and oral argument before the Sixth Circuit on a related appeal which was recently resolved against them by the Sixth Circuit.[20] *See* Docket in Case No. 04-4159.[21] Likewise, they are represented, *pro bono*, by counsel before this Court.

C. Other Less Procedurally And Factually Complex Cases Would Be More Appropriate For Certiorari.

The three-year record in this case is factually and procedurally complex. *See* Pet. App. 3a-23a; Docket in *Winkelman v. Parma City Sch. Dist.*, Case No. 1:04CV1329 (N.D. Ohio 2004); Docket in Case No. 04-4159.[22] Therefore, other cases with less developed records would be more appropriate vehicles for certiorari. As Petitioners note, the *pro se* issue is currently awaiting decision in at least one appeal in another circuit and one district court proceeding.

---

[20] Given the policy concerns surrounding representation of a child by a non-attorney parent in this complex area of law, one important consideration is whether a non-attorney parent will have the skills to adequately represent the child's interest. As Petitioners have had counsel through most of these proceedings, this case presents a poor vehicle for making this determination. As shown by the docket below, during the periods in which Petitioners attempted to represent their child's interests *pro se*, their struggles with the judicial process, resulting in inappropriate and needless filings, supports the very concerns identified by the circuit courts.

[21] FED. R. EVID. 201(b)(2).

[22] FED. R. EVID. 201(b)(2).

See, e.g., Brief of Petitioners-Appellants, *Russell v. Dep't of Educ., State of Hawaii*, No. 04-15482 (9th Cir. Jul. 16, 2004) and accompanying docket; Def. Mot. S.J., *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. Sep. 20, 2005) and accompanying docket.[23]

While either of these cases would be a better vehicle for certiorari, *Russell* in particular is better suited for certiorari. First, because the District Court in *Russell* dismissed the case at the outset based upon the *pro se* representation issue without any decision on the underlying merits, the *pro se* question is the sole issue on appeal. *See* Docket in *Russell v. Dep't of Educ., State of Hawaii*, No. 1:03CV00654 (Hawaii 2003).[24] Here, unlike *Russell*, the District Court did not address the *pro se* representation issue as Petitioners obtained counsel before the court decided Respondent's motion to dismiss based on this issue. *See* Docket in *Winkelman v. Parma City Sch. Dist.*, Case No. 1:04CV1329 (N.D. Ohio 2004). Instead, the District Court below reached a decision on the merits of the underlying appeal after Petitioners obtained counsel. Additionally, the *Russell* parents appear to have been *pro se* throughout the proceedings and were never represented by counsel. *See* Docket in *Russell v. Dep't of Educ., State of Hawaii*, No. 1:03CV00654 (Hawaii 2003). Further, the judgment in the *Russell* case will be final after the appellate court's ruling. *Id.*

---

[23] Because these dockets present facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," this Court may take judicial notice of them. FED. R. EVID. 201(b)(2).

[24] FED. R. EVID. 201(b)(2).

D. The Judgment Below Is Not Final.

This case also presents a poor vehicle for certiorari as the judgment below is not final. This Court has often noted that certiorari from interlocutory appeals is disfavored. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of cert.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *American Constr. Co. v. Jacksonville, T. & K.W. Railway Co.*, 148 U.S. 372, 384 (1893). This Court grants certiorari before a case has been disposed of only when the case is of such "imperative public importance as to justify deviation from normal appellate practice and to require immediate determination." SUPREME COURT RULE 11 (2005). These cases involve constitutional challenges, *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (constitutionality of the Federal Sentencing Guidelines); *Clinton v. City of New York*, 524 U.S. 417, n.14 (1998) (constitutionality of the line-item veto), public emergencies, *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947), or issues fundamental to further conduct in the case, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947).

With all due respect to Petitioners, this case does not involve a similar issue of "imperative public" or fundamental importance. Petitioners' arguments in their supplemental brief regarding the unauthorized practice of law ("UPL") proceedings[25] are based entirely on speculation and therefore do not have a place in this Court's decision process. First, there is no evidence of any "impending

---

[25] Respondent questions whether these documents are properly before the Court but assuming *arguendo* that they are, they do not provide a basis for this Court to grant certiorari.

prosecution of the Winkelmans for UPL." While one of Petitioners' appended documents references a purported UPL investigation of them, Supp. Pet. App. 4a, it is pure speculation to suggest that this investigation is ongoing or that prosecution is impending. Indeed, given that the Cleveland Bar Association acknowledged that the Sixth Circuit Order in Petitioners' underlying appeal is stayed, *id.* App. 9a, impending prosecution of Petitioners is unlikely.

Further, the complaint against the Woods, who are not parties to the instant proceeding, does not make this case a matter of imperative public importance. This complaint appears to be an isolated charge that was prompted by Mr. Woods' failure to cooperate with the UPL investigation. Indeed, the Cleveland Bar Association noted:

> Since the Board of Commissioners issued an Order requiring Mr. Woods to appear and he failed to appear [for a deposition], the Relator, Cleveland Bar Association, has no other option but to seek application of this Court for an Order finding Mr. Woods in contempt of this Court and sanctioning him for costs and attorneys' fees for his willful disobedience of both lawful process under Rule 45 and willful disobedience of the Board of Commissioner's Orders.

Id. App. 5a-6a.[26]

Finally, Petitioners' predictions that the decision below may lead to similar charges by other "overzealous" bar associations and will "necessarily" have a chilling effect on non-attorney parental representation of their child in court are wholly speculative. Notably, Petitioners fail to identify any other pending state bar association

[26] This Court does not need to grant certiorari to provide a remedy to the Woods as they have a strong defense in arguing that retroactive application of the *Cavanaugh* decision is improper.

complaint. Therefore, none of the arguments in Petitioners' supplemental brief provide a basis for this Court's intervention.

Additionally, this case does not present an issue which is fundamental to the further conduct of the case. Petitioners allege that absent this Court's intervention, they will have to choose between either (1) allowing the appellate court's dismissal order to become final so they can again petition this Court for review or (2) obtain a lawyer they cannot afford and moot any future opportunity to test their belief in their right to prosecute their appeal *pro se*. Pet. at 22. These claims are unavailing. First, as discussed *supra*, Petitioners' assertion that they cannot afford to obtain legal counsel is speculative as other avenues to obtain legal counsel exist.

Likewise, over a century of this Court's precedent confirms that requiring Petitioners to proceed through the normal judicial process before challenging the Sixth Circuit's ruling will not moot the *pro se* representation issue. *See Church of Scientology of California v. United States*, 506 U.S. 9, n.9 (1992) (citing seven appellate cases concluding that compliance with a federal court order does not moot that issue for appeal); *Maher v. Roe*, 432 U.S. 464, n.4 (1977); *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, Syllabus (1950); *Dakota Cty v. Glidden*, 113 U.S. 222, 225 (1885).

Therefore, given the exceptionally high standard of Rule 11, this Court should not deviate from normal procedure and grant interlocutory certiorari on this issue.

E. Petitioners Are Unlikely To Succeed On The Merits Of Their Appeal Regardless Of The Outcome Of This Petition.

Finally, this case is a poor vehicle for certiorari as Petitioners are unlikely to succeed on the merits of their

appeal before the Sixth Circuit regardless of how this Court resolves the *pro se* representation issue. As Respondent has prevailed at all levels in this case, Petitioners face the heavy burden of showing that the Impartial Hearing Officer, State Level Review Officer and the District Court all erred in concluding that Respondent's proposed placement offered Jacob a FAPE. *Doe v. Board of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 460-61 (6th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990). Given this burden, it is unlikely that Petitioners will succeed on the merits of their underlying appeal. Further, while Respondent recognizes and respects Petitioners' right to vigorously prosecute Jacob's legal rights, Respondent and its taxpayers have a corresponding right to an efficient and timely resolution to these legal proceedings. Therefore, this case presents a poor vehicle for certiorari.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHRISTINA HENAGEN PEER
(*Counsel of Record*)
CHRISTINE TOMKO COSSLER
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Phone: (216) 479-8500
Fax: (216) 479-8780

April 6, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

JILL COLYER
(513) 564-7024
www.ca6.uscourts.gov

Filed: September 20, 2005

Jeff Winkelmann
1853 Jacqueline Drive
Parma, OH 44134

Sandee Winkelman
1853 Jacqueline Drive
Parma, OH 44134

Christina H. Peer
Squire, Sanders & Dempsey
127 Public Square
Suite 4900 Key Tower
Cleveland, OH 44114-1304

RE: 04-4159
Winkelman vs. Parma School
District Court No. 04-01329

Enclosed is a copy of an order which was entered today in the above-styled case.

Jill Colyer
Case Manager

Enclosure

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 04-4159

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACOB WINKELMAN, a minor, by and through his parents and legal guardians, JEFF and SANDEE WINKELMAN, Plaintiffs-Appellants, v. PARMA CITY SCHOOL DISTRICT, Defendant-Appellee.	) ON APPEAL FROM) THE UNITED) STATES DISTRICT) COURT FOR THE) NORTHERN DISTRICT OF OHIO (Filed Sep. 20, 2005)

Before: SILER and SUTTON, Circuit Judges; SHARP, District Judge.*

PER CURIAM. Jeff and Sandee Winkelman brought this action under the Individuals with Disabilities Education Act (IDEA), *see* 20 U.S.C. § 1400 *et seq.*, seeking an appropriate educational placement for their son, Jacob. Unable to obtain relief in the district court, they filed this appeal.

Before reaching the merits of the appeal, we face a threshold question about the authority of the Winkelmans to appear *pro se* in asserting Jacob's rights under the IDEA. Our recent decision in *Cavanaugh v. Cardinal*

---

* The Honorable Allen Sharp, United States District Judge for the Northern District of Indiana, sitting by designation.

Local School District, 409 F.3d 753 (6th Cir. 2005), provides a dispositive answer to this question and (for now) to this appeal. According to *Cavanaugh,* "the IDEA does not grant parents the right to represent their child in federal court." *Id.* at 756. In reaching this conclusion, we reasoned that the IDEA "'expressly provided that parents were entitled to represent their child in administrative proceedings'" but did not "'carve out an exception to permit parents to represent their child in federal proceedings,'" an omission that prompted the inference "'that Congress only intended to let parents represent their children in administrative proceedings.'" *Id.* (quoting *Collinsgru v. Palmyra Bd. of Educ.,* 161 F.3d 225, 232 (3d Cir. 1998)); *see also id.* ("[T]he language of the IDEA evidences a congressional intent to prohibit non-lawyer parents from representing their minor children in suits brought under its provisions."). At the same time, we also concluded that parents cannot pursue their own substantive IDEA claim *pro se,* because the IDEA does not grant parents a substantive right to have their child receive a free appropriate public education. *See id.* at 757 ("[T]he text of the IDEA does not support the proposition that its guarantee of a [free appropriate public education] is a right that [a child] shares jointly with his parents."); *id.* ("[T]he intended beneficiary of the IDEA is not the parents of the individual with a disability, but the disabled individual.") (quotation omitted).

In urging us to reach a contrary conclusion, the Winkelmans make two arguments that *Cavanaugh* specifically considered and rejected. In concluding that "the language of the IDEA evidences a congressional intent to prohibit non-lawyer parents from representing their minor children in suits brought under its provisions," *id.* at 756,

Cavanaugh contradicts the Winkelmans' claim that the legislative purpose of the statute supports their right to proceed *pro se*. And *Cavanaugh* likewise "considered, and reject[ed], the reasoning of the First Circuit in *Maroni [v. Pemi-Baker Regional School District*, 346 F.3d 247 (1st Cir. 2003)]," upon which the Winkelmans rely here. *Cavanaugh*, 409 F.3d at 757. Under these circumstances, we must follow the course that *Cavanaugh* has charted for us. We accordingly dismiss the appeal unless "within 30 days of the entry of this opinion the docket on appeal reflects the entry of appearance of counsel" to represent Jacob. *Id.*

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL

IMPORTANT NOTICE:

Lead counsel must be designated if a party is represented by more than one attorney or law firm. While the Clerk's office will accept documents from any attorney who has entered an appearance and has been admitted to the Bar, only lead counsel will be on the court's service list. It is the responsibility of lead counsel to advise co-counsel of court deadlines, orders, notice of argument, decisions and any other case related activity.

COA Case No.: 04-4159 Case Manager: Jill Coyler
(from case opening letter. Required if form faxed)

Client's Name: Jacob Winkelman, Jeff Winkelman, and Sandee Winkelman

☑ Appellant ☐ Petitioner ☐ Amicus Curiae
☐ Appellee ☐ Respondent ☐ Intervenor

I am:
☑ Lead Counsel
☐ Co-Counsel

Name: Jean-Claude Andre Admitted: May 17, 2004
(Sixth Circuit admission date only)

Signature: Jean Claude Andre

Firm Name: Ivey, Smith & Ramirez

Business Address: 2602 Cardiff Ave.

Suite: [ ] City/State/Zip: Los Angeles, CA 90034

Telephone Number: (Area Code) (310) 558-0932
Fax: (310) 558-0932

E-mail Address: jc.andre@isrlaw.com

The court is anticipating greater use in the near future of e-mail to send notices to counsel. If you are willing to receive notices by e-mail, please provide your e-mail address.

Fax this form to the Clerk's office at (513) 564-7096 and serve opposing counsel. A cover letter is not necessary. Do not mail the form if you faxed it.

TRANSMISSION VERIFICATION REPORT

TIME : 10/18/2005 10:14
NAME : JEAN-CLAUDE ANDRE
FAX : 3105580932
TEL : 2025951445
SER. # : 000E3J129822

DATE, TIME	10/18 10:13
FAX NO./NAME	15135647096
DURATION	00:00:23
PAGE(S)	01
	COVERPAGE
RESULT	OK
MODE	STANDARD
	ECM

APPENDIX C

JAMES D. IVEY
MICHAEL G. SMITH
ELLIS B. RAMIREZ

OF COUNSEL
JEAN-CLAUDE ANDRÉ

JEAN-CLAUDE ANDRÉ
jc.andre@isrlaw.com

LOS ANGELES OFFICE
2602 CARDIFF AVE.
LOS ANGELES, CA 90034-1843
(310) 558-0932
VOICE/FACSIMILE

LAW OFFICES
IVEY, SMITH AND RAMIREZ
SUITE 800
1090 VERMONT AVENUE, NW
WASHINGTON, DC 20005-4927
(202) 595-1444 EXT. 4 VOICE
(202) 595-1445 FACSIMILE
HTTP://WWW.ISRLAW.COM

November 15, 2005

Attn: Jill Colyer
Hon. Leonard Green, Clerk of Court
United States Court of Appeals
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988
Facsimile: (513) 564-7096
VIA FACSIMILE

FACSIMILE TOTALS 6 PAGES
(FIVE-PAGE LETTER-BRIEF PLUS
ONE-PAGE PROOF OF SERVICE)

Re: *Winkelman ex rel. Winkelman v. Parma City School District*, No. 04-4159

Dear Mr. Green:

In response to this Court's October 25, 2005, Order, Appellants submit this letter-brief in support of their interlocutory appeal of the district court's August 24, 2004, denial of their request for an injunction to designate the Monarch School ("Monarch") as Jacob's proper "stay-put" educational placement, (R. 8 Aug. 24, 2004 Order).[1] For the reasons set forth in Appellants' *Pro Se* Opening Brief and set forth below, Appellants respectfully request that this Court either reverse, or alternatively, vacate with instructions the district court's August 24, 2004, Order.

The parties agree, (Appellants Br. at 5; Parma Br. at 25), that, rather than analyze the merits of Appellants' argument that Monarch was the proper stay-put placement for Jacob, the district court concluded that Appellants forfeited their right to stay-put placement by, in the district court's words, "unilaterally remov[ing] their child from public school prior to the completion of the IDEA review process . . . at their own financial risk," (R. 8 Aug. 24, 2004, Order, at 3 (quoting *Knable v. Bexley City Sch.*

[1] On November 2, 2005, this Court extended the deadline by which this letter-brief was due to and including November 15, 2005. The Court's order was silent as to when Appellee's letter-brief in response shall be due. As Appellants noted in their November 1, 2005, motion seeking the extension, Appellants have no objection to Appellee being given an equal amount of time in which to file their letter-brief in response.

Dist., 238 F.3d 755, 763 (6th Cir. 2001))). This conclusion was in error. The district court confused the unavailability of Jacob's "then-current educational placement," 20 U.S.C. §1415(j), Achievement Centers for Children ("ACC"), which required Appellee to "provide [Jacob] with placement in a similar program during the pendency of administrative and judicial proceedings," *Laster v. Dist. of Columbia*, ___ F. Supp. 2d ___, 2005 WL 2429748, *3 (D.D.C. Sep. 26, 2005) (citations omitted), with those situations in which parents "unilaterally place" their child at their own financial risk, *see Knable,* 238 F.3d at 763.

Appellants' placement of Jacob at Monarch was not a "unilateral placement" within the meaning of the IDEA. The term "unilateral placement" does not appear in the IDEA. Courts, including this Court, have used the term to connote those situations in which parents remove their disabled child from the child's "then-current educational placement" (a public school or a private school for which the school district agreed to pay) and, while challenges to the appropriateness of the public school's Individualized Education Plan ("IEP") for the child is being disputed, enroll the child at a private (or different private) school. *See, e.g., Burlington Sch. Comm. v. Mass. Dep't of Ed.*, 471 U.S. 359, 362 (1985) ("Believing that the Town's proposed placement of Michael at the Pine Glen School was inappropriate in light of Michael's needs, Mr. Panico enrolled Michael in the Carroll School in mid-August at his own expense."); *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 517-18 (6th Cir. 2003) (parents removed child from Heritage Elementary, a public school, and placed child at Medina Christian Academy, a private sectarian school); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 761 (6th Cir. 2001) (parents removed child from public school, rejected

private placement proposed in IEP, and enrolled child in different private school); *Tucker v. Colloway County Bd. of Ed.*, 136 F.3d 495, 498 (6th Cir. 1998) (parents removed child from Calloway County public school and placed child at the Learning and Cognitive Development Center, a private school in Boston).

The IDEA's "'stay-put' provision . . . requires a child to remain in his or her 'then-current educational placement' during the pendency of an IDEA hearing." *Schaffer v. Weast*, ___ U.S. ___, 2005 WL 3028015, *6 (Nov. 14, 2005) (citing 20 U.S.C. § 1415(j)); *see also* 34 C.F.R. § 300.514 ("[D]uring the pendency of any administrative or judicial proceeding regarding a complaint under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement."). For purposes of the IDEA's "stay put provision, the current educational placement is typically the placement described in the child's most recently implemented IEP." *Johnson ex rel. Johnson v. Special Educ. Hr'g Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) (citing *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990)). The parties agree, and the district court found, that the most recently implemented IEP was the October 9, 2002 to June 5, 2003, IEP ("2002-03 IEP"). (Winkelman Br. at 3; Parma Br. at 20; R. 33 Jan. 11, 2005 Order at 5; *see also generally* R. 6 Mot. in Opp. to Mot. for TRO, Ex. 9.) This IEP provided that Jacob's placement from October 9, 2002, to June 5, 2003, and from July 1 to July 31, 2003, would be at Achievement Centers for Children. (*See* R. 6 Mot. in Opp. to Mot. for TRO, Ex. 9, at 5.) Because no subsequent IEPs were implemented, Jacob's "then-current educational placement" for the purposes of the IDEA's stay-put provision is

the 2002-03 IEP. *See Johnson*, 287 F.3d at 1180; *see also Spillsbury v. Dist. of Columbia*, 307 F. Supp. 2d 22, 25 (D.D.C. 2004); *accord Laster*, 2005 WL 2429748 at *4.

Unlike the "unilateral placement" scenarios cited above, in all of which the disabled children's "then-current educational placement" remained available but the parents chose to place their children at a different school, here Jacob's "then-current educational placement" became unavailable to him on August 27, 2003 – the first day of school at ACC for the 2003-04 school-year.[2] Indeed, IHO

---

[2] Appellee argues that this was not the case. Specifically, Appellee asserts that ACC "was willing to educate Jacob." (Parma Br. at 5.) This assertion is based on a September 14, 2004, affidavit from Cuyahoga County Education Service Center Special Education Supervisor Kate Foley, in which she stated that

> [t]he Achievement Center was prepared to abide by the hearing officer's order and educate Jacob at the Achievement Center for the 2003-04 school year. To do so, the Achievement Center planned to work with the Parma City School District. . . . Although various plans were discussed, nothing was finalized. . . .

(R. 15 Mot. Strike, Ex. 4, at 1-2.)

While this may have *eventually* become true – Ms. Foley's affidavit was prepared in September 2004, which was *over one year after* Jacob was supposed to begin his 2003-04 stay-put placement at ACC – Appellee has provided no evidence that it had taken efforts to ensure that Jacob could begin the 2003-04 school year at ACC. Nor could Appellee provide such evidence, because the record establishes (1) that, as of August 14, 2003 – approximately two weeks before the beginning of the 2003-04 school year – ACC had stated that it could not educate Jacob for the 2003-04 school-year and (2) that, as of October 27, 2003, ACC could still not educate Jacob for the 2003-04 school-year.

In particular, Judith Hudgins, the District's Special Education Supervisor acknowledged as much in an August 14, 2003, affidavit, where she stated that she

> recently spoke with an administrator at the Achievement Center, Kate Foley, regarding whether Jacob could attend the Achievement Center for another school year. *Ms. Foley informed me that*

(Continued on following page)

Freda predicted that this might happen in her August 27, 2003, Stay Put Order, (R. 15 Mot. Strike, Ex. 3, at 5).[3] Nonetheless, Appellee did not make any *timely* arrangements for Jacob to remain at ACC. *See supra* note 2. And, as both IHO Hagen in her June 2, 2004, Due Process decision, and the district court in its January 11, 2005, decision recognized, absent timely efforts by Appellee to enable Jacob to attend ACC for the 2003-04 school year, Appellants were precluded from sending Jacob there. (*See* Compl., Ex. 3, at 11 n.3 ("[B]ecause the Achievement Center does not serve six-year-olds, and Jacob had completed the preschool curriculum. . . . it is questionable whether parents could have complied with the stay-put order."); R. 33 Jan. 11, 2005, Order at 5 ("Here, it is undisputed that Jacob's most recent IEP placement was at

---

because Jacob has turned six years old and is a school-age child, he cannot attend the preschool.

(R. 15 Mot. Strike, Ex. 5, at 12 (emphasis added).) ACC's position was the same on October 27, 2003 – two months after the beginning of the 2003-04 school year, when Ms. Foley testified before the Impartial Hearing Officer ("IHO") that "Achievement Center doesn't have anything post kindergarten. . . . Only the preschool." (R. 22 Admin. Record No. 3, K. Foley at TR 356.) This evidence establishes that ACC, Jacob's "then-current educational placement" was unavailable to him at the beginning of the 2003-04 school-year, and Appellee has provided no compelling evidence to rebut it. Moreover, should the Court desire direct evidence that Jacob was *refused* enrollment by ACC at the beginning of the 2003-04 school-year, Appellants will be able to provide such evidence to the district court on remand.

[3] IHO Freda's order stated, "Stay put is effective for the pendency of due process, in most instances through appeals at the district court level. The time frame involved in the appeal process is frequently quite lengthy. . . . However, the Achievement Center will not be addressing 'kindergarten services', and it is entirely possible that, in the future – perhaps as soon as five or six months – the parents or the school district may conclude such placement is no longer appropriate." (R. 15 Mot. to Strike, Ex. 3, at 5).

Achievement Center. Moreover, it is undisputed that Achievement Center was the operative placement when the dispute first arose. However, given the unique facts of this case, placing Jacob at Achievement School would be an absurd and potentially harmful result.")).[4] Nor did Appellee contact Appellants and offer them an alternative placement for Jacob – such as offering for Jacob to attend Parma's kindergarten program – during the first week of the 2003-04 school-year.[5]

---

[4] Appellee spends considerable time discussing various decisions of the IHO, the SLRO, and the district court from February 25, 2004, to January 11, 2005. (Parma Br. at 9-14.) Appellee champions these decisions' findings that Parma provided Jacob with a FAPE. That procedural history is certainly interesting in an academic sense and will be relevant to this Court's resolution of the related appeal (Case No. 05-3886) which actually involves the issue whether Parma's proposed 2003-04 IEP provided Jacob with a FAPE and which this Court declined to consolidate with this appeal. (July 26, 2005, Order.) But that procedural history and those findings are *entirely irrelevant* to the instant appeal, which concerns only whether the district court erroneously determined that Jacob was not entitled to stay-put placement at Monarch. Stay-put proceedings and judicial review of FAPE findings are entirely distinct, and this Court should not be confused or misled by the District's creative advocacy into amalgamating the two inquiries. Moreover, any analysis of those decisions in this appeal would amount to an advisory opinion as to how this Court should evaluate the 05-3886 appeal.

[5] Parma's 2003 kindergarten school-year began on September 2, 2003, *see* http://www.parmacityschools.org/calendar/index.asp?DateShow 09/02/2003, with teachers reporting for work on August 27, 2003, *see* http://www.parmacityschools.org/calendar/index.asp?DateShow=08/27/2003, and various orientation activities for kindergarten parents and students taking place on August 28 and 29, 2003, *see* http://www.parmacityschools.org/calendar/index.asp?DateShow=08/28/2003; http://www.parmacityschools.org/calendar/index.asp?DateShow=08/29/2003. Parma's "calendar" webpage was last visited and all dates were verified by counsel on November 8, 2005. Because these dates are "capable of accurate and ready determination by resort to sources whose accuracy

(Continued on following page)

It is well-settled that "if a child's then-current educational placement is not available, the *school system* must provide the student with placement in a similar program during the pendency of administrative and judicial proceedings." *Laster,* 2005 WL 2429748, at 3 (citing *Knight v. Dist. of Columbia*, 877 F.2d 1025, 1029 (D.C. Cir. 1989); *McKenzie v. Smith*, 771 F.2d 1527, 1533 (D.C.Cir.1985); *Block v. Dist. of Columbia*, 748 F. Supp. 891, 898 n.9 (D.D.C. 1990)). By failing to timely ensure that Jacob could enroll at ACC, or alternatively, timely offering Appellants a kindergarten placement for Jacob for the 2003-04 school-year, Appellee left Appellants with no choice but to find a suitable substitute placement for ACC. Indeed, had Appellants failed to do so, Appellants would have been in violation of Ohio law, which requires that "[e]very parent of any child of compulsory school age . . . must send such child to a school or a special education program . . . for the full time the school or program attended is in session. . . . Such attendance must begin within the first week of the school term."[6] Ohio Rev. Code § 3321.04. Monarch School, where Appellants took Jacob when ACC became unavailable and Appellee failed to offer Jacob a place in Appellee's kindergarten program for the

---

cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of them. Moreover, this Court has repeatedly taken "an expansive view" of judicial notice in IDEA cases. *See, e.g., Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 850 (6th Cir. 2004).

[6] Per § 3321.01, Jacob was "of compulsory school age" for the 2003-04 school-year because he was six years old. *See* Ohio Rev. Code § 3321.01 ("A child between six and eighteen years of age is 'of compulsory school age' for the purpose of sections 3321.01 to 3321.13 of the Revised Code.").

2003-04 school-year and where Jacob is currently enrolled,[7] was and is the appropriate substitute for ACC because, as the record amply demonstrates, Monarch's provision of services to Jacob has been nearly identical to the services agreed to under the 2002-03 IEP. (*See* R. 22 Admin. Record No. 5, D. Mandell at TR 215 ("We are following the present IEP. . . . [t]he IEP he had from the Achievement Center.").

For these reasons, Appellants respectfully submit that the district court erred by not designating Monarch as Jacob's stay put placement. Accordingly, this Court should either reverse or vacate and remand with instructions for further factual development the district court's August 24, 2004, order. Any ruling from this Court to the contrary would reward Appellee for its failure to comply with IHO Freda's August 27, 2003, stay-put order and grant Appellee a windfall for doing so.

---

[7] Appellants take exception to the District's repeated assertions that "[t]hroughout the district court proceedings, the Winkelmans have not sent Jacob to school." (Parma Br. at 11; *see also id.* ("[T]he Winkelmans have chosen not to re-enroll Jacob at Pleasant Valley, complete the required home schooling paperwork or enroll him) at a private school. . . . [T]hey have opted to keep Jacob out of school. . . .").) These assertions are (1) irrelevant to the issue presently before the Court, (2) not supported by the District with citations to the record, and (3) calculated to prejudice this Court against the Winkelmans and invite the Court to conclude that the Winkelmans are irresponsible parents. Moreover, they are also inaccurate. Attached as Exhibit "C" to the Winkelmans' January 3, 2005, Motion for Injunction Pending Appeal filed with this Court in this appeal was a December 13, 2004, letter from the Director of Monarch School, Debra Mandell, indicating that Jacob is enrolled at Monarch school and. . . . [h]is enrollment will continue pending the December 17th conference with Judge Manos." (Jan. 3, 2005, Mot. Inj., Ex. C.)

Appellants request oral argument and, should the Court find that it desires further briefing on any of the issues set forth here or in any other brief filed in this appeal, Appellants would be happy to provide further briefing.

Respectfully submitted,

/s/ Jean-Claude André
Jean-Claude André

PROOF OF SERVICE BY U.S. MAIL, FACSIMILE, AND EMAIL

I am a citizen of the United States and a member of the bar of this Court. I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 2602 Cardiff Ave., Los Angeles, California 90034. On November 15, 2005, I served a copy of Plaintiffs-Appellants' attached

SUPPLEMENTAL LETTER BRIEF

on counsel for Defendant-Appellee as listed below:

Christina H. Peer, Esq.
Christine M. Tomko Cossler, Esq.
Squire, Sanders & Dempsey
127 Public Square
Suite 4900 Key Tower
Cleveland, OH 44114-1304
Facsimile: (216) 479-8795
Email: cpeer@ssd.com

Service was effected by (1) putting a true and correct copy of the above-described document in a sealed envelope addressed to counsel for Defendant-Appellee, with postage fully prepaid, and placing the envelope for collection and

mailing today with the United States Postal Service; (2) faxing a true and correct copy of the above-described document to counsel for Defendant-Appellee; and (3) emailing a true and correct .PDF copy of the above-described document to counsel for Defendant-Appellee.

I declare under penalty of perjury under the laws of the United States that the above is true and correct. Executed on November 15, 2005, at Los Angeles, California.

/s/ Jean-Claude André
Jean-Claude André

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB WINKELMAN, a minor, by and through his parents and legal guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN,	Case No. 05-3886
Plaintiffs-Appellants	**APPELLEE'S MOTION TO DISMISS**
v.	
PARMA CITY SCHOOL DISTRICT,	
Defendant-Appellee.	

Defendant-Appellee Parma City School District Board of Education, ("Parma" or the "District") hereby moves for dismissal of Plaintiffs-Appellants Jeff and Sandee Winkelman's ("the Winkelmans") above-captioned appeal unless the Winkelmans obtain counsel. As non-attorneys, the Winkelmans may not represent their child *pro se* in federal court. Therefore, Parma requests that this Court afford the Winkelmans a reasonable time to obtain counsel subject to dismissal of their appeal with prejudice if they fail to do so. A Memorandum of Law in support of the District's Motion is attached hereto and incorporated herein by reference.

Respectfully submitted,

/s/ Christine Tomko Cossler
Christina Henagan Peer (0071579)
CPeer@ssd.com

Christine Tomko Cossler (0075340)
CCossler@ssd.com
SQUIRE, SANDERS & DEMPSEY, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500 Telephone
(216) 479-8795 Facsimile
Attorneys for Defendant-Appellee
Parma City School District Board
of Education

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB WINKELMAN, a minor, by and through his parents and legal guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN, Plaintiffs-Appellants v. PARMA CITY SCHOOL DISTRICT, Defendant-Appellee.	Case No. 05-3886 **APPELLEE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

It is axiomatic that a non-attorney may not represent another person's legal interests in court. Recently, this Court found that this prohibition extends to parents' *pro se* representation of their children in proceedings arising under the Individuals with Disabilities in Education Act

("IDEA"). Appellants Jeff and Sandee Winkelman ("the Winkelmans") are non-attorneys who are representing the legal interests of their son, Jacob, *pro se* in the above-captioned IDEA matter. Consequently, Appellee Parma City School District Board of Education ("the District" or "Parma") asks this Court to require the Winkelmans to obtain counsel subject to dismissal of their appeal with prejudice if they do not obtain counsel within a reasonable time.

II. BRIEF STATEMENT OF FACTS

This case arises from a dispute concerning special education services under the IDEA. On June 5, 2003, the Winkelmans filed a request for due process, alleging the Individualized Education Plan ("IEP") offered by the District did not offer Jacob a free appropriate public education ("FAPE"). When the parties could not reach an agreement regarding Jacob's stay-put placement during the pendency of the due process hearing, the dispute was submitted to the Impartial Hearing Officer (IHO) for resolution. The IHO decided Jacob's stay-put placement was the Achievement Center for Children ("Achievement Center"). However, Jacob did not attend the Achievement Center during the 2003-04 school year because the Winkelmans unilaterally placed him at a private school, Monarch School, prior to the start of the school year.

A four day due process hearing was held and, on February 25, 2004, the IHO issued a written decision, finding the program offered by the District provided Jacob with a FAPE. The Winkelmans appealed this decision to a State Level Review Officer ("SLRO"). After reviewing the extensive record, on June 2, 2004, SLRO Hagan concluded

that the IHO did not err in finding the District offered Jacob a FAPE. On July 15, 2004, the Winkelmans, *pro se*,[1] appealed the SLRO's decision to the U.S. District Court for the Northern District of Ohio.

On August 23, 2004, the Winkelmans filed a Motion for Temporary Restraining Order asking the Court to order Monarch School as Jacob's stay-put placement during the pendency of the court proceedings. The District Court denied the Winkelmans' motion on August 24, 2004. The Winkelmans subsequently filed a Motion for Reconsideration which was also denied.[2] In March 2005, the parties briefed the substantive merits of the case and filed cross-motions for judgment on the administrative record with the District Court. With the cross-motions, the Winkelmans sought reversal of the SLRO's decision and reimbursement for educating Jacob at Monarch School while Parma sought affirmance of the SLRO's decision in its entirety.

On June 2, 2005, Judge Manos denied the Winkelmans' Motion for Judgment on the Administrative Record and granted the District's Motion for Judgment on the Administrative Record. Specifically, Judge Manos found that the state appointed hearing officers did not err in

---

[1] The Winkelmans later obtained counsel and were represented by counsel at the time of the submission of the briefs on the merits as well as at the time Judge Manos's issued his decision on the merits.

[2] While their Motion for Reconsideration was pending, the Winkelmans filed an interlocutory appeal of the District Court's denial of their request for an injunction placing their son in a private school rather than Parma's proposed educational placement. This appeal is still pending before this Court as Case No. 04-4159. A similar motion to dismiss based on the Winkelmans' *pro se* representation is also pending before this Court in Case No. 04-4159.

determining that Parma had offered Jacob a FAPE. Judge Manos upheld these decisions and denied the Winkelmans' request for reimbursement for Jacob's unilateral placement at a private school.

On July 1, 2005, the Winkelmans, proceeding *pro se,* filed the instant appeal of Judge Manos' June 2, 2005 decision.

III. LAW AND ARGUMENT

A. THE WINKELMANS CANNOT REPRESENT THEIR CHILD *PRO SE* IN FEDERAL COURT UNDER THE IDEA.

It is well settled that a non-attorney may not represent the interests of another in court. *Heldt v. Nicholson,* 2000 U.S. App. LEXIS 21246, *4 (6th Cir. Aug. 10, 2000) ("That a non-lawyer may not represent another person in court is a venerable common law rule based on the strong state interest in regulating the practice of law") (attached) *citing Collinsgru v. Palmyra Bd. of Educ.,* 161 F.3d 225 (3rd Cir. 1998). This prohibition extends to non-lawyer parents, such as the Winkelmans, representing their children in court proceedings. *See Shepherd v. Wellman,* 313 F.3d 963, 970-71 (6th Cir. 2002); *Rawlings v. Littleton,* 1994 U.S. App. LEXIS 9703 (6th Cir. Apr. 28, 1994) (attached) *affirming Rawlings v. Littleton,* No. 92-00094 (W.D. Ky. July 8, 1992) (holding that a parent who is not an attorney could not represent the interests of her minor children). As this Court explained, "[P]arents cannot appear pro se on behalf of their minor children because a minor's personal cause of action is her own and does not belong to her parent or representative." *Shepherd,* 313

F.3d at 970-71 (citing *Cheung v. Young Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990)).

Recently, this Court held that the prohibition on non-attorney parents representing the interests of their children also extends to a court proceeding arising under the IDEA. *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005). In concluding that non-lawyer parents may not represent their child in court in an action brought under the IDEA, the *Cavanaugh* Court found that neither Federal Rule of Civil Procedure 17 nor the IDEA give parents such a right. *Id.* at *4-8. The *Cardinal* Court also expressly rejected the argument that the IDEA confers joint rights on both children and their parents, reasoning "the intended beneficiary of the IDEA is not the parents of the individual with a disability, but the disabled individual." *Id.* at *8 (citations omitted). Accordingly, the *Cardinal* Court found:

> the right of disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents. Therefore, ***any right on which the [parents] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent upon the [parents'] proceeding, through counsel, with their appeal on [their child's] behalf.***

Id. at *10-11. The *Cavanaugh* Court provided the family with an opportunity to obtain counsel and stated that failure to do so would result in the dismissal of their appeal.

Based on the above reasoning, this Court should find that the Winkelmans may not proceed *pro se* in their instant appeal under the IDEA but instead must obtain counsel.

IV. CONCLUSION

For the foregoing reasons, the District respectfully requests that this Court give the Winkelmans a reasonable time to obtain counsel and dismiss their appeal with prejudice if they fail to do so.

Respectfully submitted,

/s/ Christine Tomko Cossler
Christina Henagan Peer (0071579)
CPeer@ssd.com
Christine Tomko Cossler (0075340)
CCossler@ssd.com
SQUIRE, SANDERS & DEMPSEY, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500 Telephone
(216) 479-8795 Facsimile
Attorneys for Defendant
Parma City School District
Board of Education

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2005, a copy of the foregoing Appellee's Motion to Dismiss and Memorandum in Support was sent by U.S. mail to Mr. and Mrs. Jeff Winkelman, 1853 Jacqueline Drive, Parma, Ohio 44134.

/s/ Christine Tomko Cossler
One of the Attorneys for
Defendant-Appellee Parma
City School District

2000 U.S. App. LEXIS 21246

LINDA ANN HELDT; DOUGLAS DWIGHT BENNETT, Plaintiffs-Appellants, v. JULIE A. NICHOLSON; RALPH H. NELSON; STATE BAR OF MICHIGAN; LAWYERS POLITICAL ACTION COMMITTEE; ALFRED M. BUTZBAUGH; THOMAS J. RYAN; BRUCE W. NECKERS; REGINALD M. TURNER, JR.; THOMAS K. BYERLEY; MICHIGAN SECRETARY OF STATE CANDICE S. MILLER, Defendants-Appellees.

No. 99-2120

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

August 10, 2000, Filed

COUNSEL: LINDA ANN HELDT, Plaintiff-Appellant, Pro se, Washington, MI.

DOUGLAS DWIGHT BENNETT, Plaintiff-Appellant, Pro se, Flat Rock, MI.

For JULIE A. NICHOLSON, RALPH H. NELSON, Defendants-Appellees: William G. Pierson, Oakland County Prosecutor's Office, Pontiac, MI.

For STATE BAR OF MICHIGAN, MICHIGAN SECRETARY OF STATE, CANDICE S. MILLER, Defendants-Appellees: James T. Farrell, Office of the Attorney General, Lansing, MI.

For LAWYERS POLITICAL ACTION COMMITTEE, Defendant-Appellee: David C. Coey, Dickinson, Wright, Moon, Van Dusen & Freeman, Lansing, MI.

For ALFRED M. BUTZBAUGH, THOMAS J. RYAN, BRUCE W. NECKERS, REGINALD M. TURNER, JR.,

THOMAS K. BYERLEY, Defendants-Appellees: Victoria V. Kremski, State Bar of Michigan, Lansing, MI.

JUDGES: Before: SUHRHEINRICH and DAUGHTREY, Circuit Judges; COLLIER, District Judge.*

OPINION: ORDER

Linda Ann Heldt and Douglas Dwight Bennett, Michigan residents, appeal pro se a district court order dismissing their alleged civil rights action for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary relief, Heldt and Bennett filed this action against two Michigan state court judges, the state bar association and several of its officers, the Lawyers' Political Action Committee, and the Michigan Secretary of State. In a complaint over 45 pages in length, the only intelligible claim raised was that the two state court judges named as defendants had denied them their "right" to have Bennett represent Heldt in state court, although Bennett is not a licensed attorney.

The several defendants filed motions to dismiss, and the district court issued an order to show cause why the complaint should not be dismissed. Heldt and Bennett filed responses. The district court then dismissed the complaint for failure to state a claim, concluding that the

---

* The Honorable Curtis L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.

issue raised had recently been decided in another appeal in this court. *See Neilson v. State of Michigan*, 1999 U.S. App. LEXIS 8698, No. 98-1317, 1999 WL 313854 (6th Cir. May 3, 1999), *cert. denied*, 145 L. Ed. 2d 318, 120 S. Ct. 408 (1999). The district court also invited the defendants to submit statements of their costs and attorney fees for consideration of the imposition of sanctions.

On appeal, Heldt and Bennett appear to be reasserting their original claim. Some of the defendants have requested the imposition of sanctions pursuant to 28 U.S.C. § 1912 and Fed. R. App. P. 38.

Upon review, we conclude that this complaint was properly dismissed for failure to state a claim, as Heldt and Bennett could prove no facts which would entitle them to relief. *See Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993).

The argument that lay individuals have a constitutional right to be represented by and to represent other lay individuals in court has been consistently rejected by this court every time it has been raised by Bennett in his many appeals. In addition to the case relied on by the district court, Bennett has had this argument rejected in *Neilson v. State of Michigan*, 1999 U.S. App. LEXIS 23311, No. 98-1754, 1999 WL 776169 (6th Cir. Sept. 20, 1999), *Farmer v. City of Hazel Park*, 1996 U.S. App. LEXIS 16865, No. 95-1928, 1996 WL 287305 (6th Cir. May 29, 1996), and *Bennett v. Batchik*, 52 F.3d 324, 1995 WL 236679 (6th Cir. 1995). As to plaintiff Bennett this argument is barred by issue preclusion. *See N.L.R.B. v. Kentucky May Coal Co.*, 89 F. 3d 1235, 1239 (6th Cir. 1996); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). As to plaintiff Heldt, we are barred by stare decisis.

Moreover, the grounds previously cited for rejection of this argument remain valid. That a non-lawyer may not represent another person in court is a venerable common law rule based on the strong state interest in regulating the practice of law. *See Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231-32 (3rd Cir. 1998) (citing cases). It also remains true that the named defendants would be immune from the imposition of monetary damages due to absolute, Eleventh Amendment, and qualified immunity.

For the above reasons, the district court's order dismissing this complaint is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit. Due to the frivolity of this appeal, the defendants are invited to submit bills of costs and attorney fees for the panel's consideration. Heldt and Bennett may then file a response. *See* Fed. R. App. P. 38; 28 U.S.C. § 1912.

1994 U.S. App. LEXIS 9703

LINDA RAWLINGS, Plaintiff-Appellant, v. SCOTT LITTLETON, M.D.; LONNIE LYLES; PEGGY NUNN; MARY KUCHUNBAUM; DAUN ANDREWS; RANDY KIMBROUGH; PAMELA BEATY; RICK DORSEY; JUDY GLASS; PAT GUTHRIE; DENNIS MINIX; MARY ROSS; ERNIE SMALL; BUDDY TURNER; MARGARET FREEMAN; THOMAS R. LEWIS, Judge; BILL HAYNES; MARGARET YOUNG; JO ANN COLEMAN; BILL ANDREWS; MICHAEL MOORE; GARY EHLING; MADENA BASHAM; KENNETH ROYSE; THERESA NELSON; BOB RATHBAUM; BECKY MILLER; JOHNNY WATTS; JOHN HOYLE; MARGARET ROBBINS; JOHN CHILDRESS; JO ANN FARINA; GARY DRAKE; CHARLES BAKER; SUZANNE PASH; CATHY REEVES, Defendants-Appellees.

No. 93-5223

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

April 28, 1994, Filed

JUDGES: BEFORE: MERRITT, Chief Judge; KENNEDY and NELSON, Circuit Judges.

OPINION: ORDER

Linda Rawlings appeals a district court order dismissing her civil rights action filed pursuant to 42 U.S.C. § 1983. The defendants have filed various motions to dismiss. Rawlings has filed a motion for a restraining order, and the defendants have responded. Rawlings has also filed a motion to supplement the record and a motion to produce records. The defendants also request attorney's fees for the expense of responding to Rawling's motion to supplement the record. The case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Rawlings originally filed six complaints, three of which also named Rawlings's son as a plaintiff. The complaints against numerous defendants, which the district court consolidated, arose out of court proceedings resulting in the removal of Rawlings's son from her home and his placement in the Rivendell Youth Center and the Dessie Scott Children's Home in Pine Ridge, Kentucky. In a typewritten statement of claim attached to each of the six separate complaints, Rawlings alleged that she has not been allowed to visit her son for almost one year and that she has not been provided family therapy that would prepare her for her son's return to her home; that Social

Services has hidden wrongdoings by Dessie Scott Children's Home; and that her son has had medical problems, has been denied medical attention, and has lost a total of 57 pounds while in the custody of Social Services. Rawlings alleged additional claims such as medical malpractice, defamation of character, blackmail, lost wages, assault charges on behalf of her son, and filing false incident reports. She sought injunctive and monetary relief.

On July 8, 1992, the district court dismissed the allegations on behalf of Rawlings's son. The court held that a parent who is not an attorney could not represent the interests of her minor children. *See Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (per curiam); *Lawson v. Edwardsburg Public School*, 751 F. Supp. 1257, 1258 (W.D. Mich. 1990); *Pierce v. Stinson*, 493 F. Supp. 609, 611 (E.D. Tenn. 1979). The court also ordered Rawlings to amend her complaint to allege facts sufficient to state a legal theory of recovery cognizable under § 1983.

Rawlings filed an amended complaint on July 24, 1992, and the defendants filed various motions to dismiss. In separate memorandum opinions and orders entered December 21, 1992, and February 3, 1993, the district court dismissed the complaint against the various defendants for failure to state a claim upon which relief may be granted.

Initially, we address the defendants' motions to dismiss Rawlings's appeal. First, contrary to the defendants' claim, Rawlings properly perfected an appeal. A mistake in designating the judgment appealed from is not always fatal as long as the intent to appeal from a specific ruling can be fairly inferred by probing the notice.

Sanabria v. United States, 437 U.S. 54, 57 n.21, 57 L. Ed. 2d 43, 98 S. Ct. 2170 (1978). In this case, it can be fairly inferred that Rawlings intended to appeal the decision of the district court dismissing her case against all defendants. Accordingly, Rawlings properly perfected an appeal from the district court's decision in its entirety.

Second, contrary to the defendants' claim, the Sixth Circuit docket sheet reflects that Rawlings did file a motion to proceed in forma pauperis in the Sixth Circuit on March 1, 1993, well before the March 22, 1993, deadline. The motion to proceed in forma pauperis was denied in an order filed May 10, 1993, and Rawlings paid the filing fee on May 14, 1993. Thus, the defendants' claim on this point must fail.

We will only address the dismissal of Rawlings's claims. We need not address the purported claims asserted on Rawlings's son's behalf because we agree with the district court that Rawlings cannot represent the interests of her minor son in this case. The district court ruled that a parent who is not an attorney could not represent the interests of her minor children. We note that a parent, if appointed next friend, could sue on her minor child's behalf. *See* Fed. R. Civ. P. 17(c). However, there is no indication from the record that Rawlings was appointed next friend in this case.

Upon review, we conclude that the dismissal of Rawlings's suit was proper as Rawlings undoubtedly can prove no set of facts in support of her claims that would entitle her to relief. *Meador v. Cabinet for Human Resources*, 902 F. 2d 474, 475 (6th Cir.), *cert. denied*, 498 U.S. 867, 112 L. Ed. 2d 145, 111 S. Ct. 182 (1990); *Dana Corp. v. Blue Cross & Blue Shield Mut.*, 900 F. 2d 882, 885 (6th

Cir. 1990). A pleading which sets forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts underlying the claim, the plaintiff must provide sufficient allegations to give the defendants fair notice of the claims against them. *See Leatherman v. Tarrant County Narcotics*, 122 L. Ed. 2d 517, 113 S. Ct. 1160, 1163 (1993). Here, Rawlings failed to set forth any allegations in her complaints to support a legal theory of recovery cognizable under § 1983.

Accordingly, the motions to dismiss are denied, the motion for injunctive relief is denied, the request for attorney's fees is denied, the motion to supplement the record is denied, the motion to produce records is denied, and the district court's order dismissing Rawling's six complaints is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACOB Winkelman, a minor, by and through his parents and Legal Guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN, **Plaintiffs-Appellants,** **-v-** **PARMA CITY SCHOOL DISTRICT,** **Defendant-Appellee.**	**CASE NO. 05-3886** **PLAINTIFFS-APPELLANTS MEMORANDUM IN OPPOSITION TO DEFENDANTS-APPELLEE MOTION TO DISMISS**

Now come Plaintiffs-Appellants, Jacob Winkelman, a minor, ("J.W.") by and through his parents and legal guardians, Jeff and Sandee Winkelman, and Jeff and Sandee Winkelman, ("the Winkelmans") and hereby submits their memorandum in opposition to Defendants-Appellees Parma City School District ("Parma") Motion to Dismiss.

INTRODUCTION

Parma has filed a motion on July 12, 2005, to dismiss this legal action because the Winkelmans cannot afford to hire an ɛttorney, and therefore, have been forced to proceed in *pro se* in order to protect their own rights and the rights of their child under the Individuals with Disabilities

Education Act (IDEA). The Winkelmans have exhausted their finances and are unable to continue with affording an attorney, as we do not have unlimited public funds to utilize to pay an attorney as Parma is allowed with paying their attorneys. It should be noted that this appeal was filed on July 1, 2005, and that this Court has already permitted the Winkelmans to proceed *pro se* over the objections of Parma and briefs have been filed by both sides. See Order issued November 4, 2004, footnote one (1).

On July 1, 2005, the Winkelmans filed a notice of appeal to the Sixth Circuit Court of Appeals for the purpose of appealing Judge Manos' decision denying the Winkelmans Motion for Judgment on the Administrative Record on June 2, 2005.

LAW AND ARGUMENT

It is respectfully submitted that, because the Court has already permitted the Winkelmans to proceed in pro se, Parma is collaterally estopped from relitigating this issue. Parma must allow the panel to decide the issue on the merits.

The Winkelmans acknowledge that there have been decisions on both sides of this issue along with a decision with regards to the Cavanaugh's, which the merits of this appeal can be distinguished, very different from that of

---

[1] The issue of whether Jeff and Sandee Winkelman, acting pro se, may represent the interests of their minor child in the appeal is referred to the panel to be assigned to hear the appeal on the merits. ENTERED BY ORDER OF THE COURT

Cavanaugh. While Parma attempts to belittle the Winkelmans for not being as legally savvy as their team of high priced lawyers, Parma is now instructing this court to order the Winkelmans to do what Parma thinks the court should do, without a decision from this court and by predetermining the decision of the panel before the panel reaches the merits of the appeal, as the court previously instructed in its order of Nov.4, 2004.

Congress just recently reauthorized the IDEA 2004 leaving the procedural provisions unchanged as to the rights of parents to represent their handicapped children's interests in IDEA cases. Moreover, both chambers of Congress have passed similar bills reauthorizing the IDEA, in May 2004. During the course of said reauthorizations, Congress had opportunities to specifically write in a provision prohibiting parents from proceeding *pro se* on judicial reviews of IDEA administrative proceedings. Congress chose not to include such a provision even though school administration lobbies had specifically asked for such to be included in both reauthorizations. The conspicuous absence of such a provision clearly indicates a legislative intent to permit parents to continue to pursue judicial reviews of IDEA administrative proceedings in *pro se*.

Moreover, the Winkelmans respectfully submit that the recent reauthorization of IDEA 2004 effective July 1, 2005, on this issue, clearly indicates a judicial recognition of the Congressional intent to allow parents to proceed *pro se* in IDEA cases. (Exhibit A)

The Winkelmans respectfully submit that the July 1, 2005, very recent reauthorization of IDEA 2004, and a wide range of other well reasoned federal cases clearly

captures the legislative intent of the IDEA. The Winkelmans therefore ask this Honorable Court to reevaluate the July 1, 2005 reauthorization of IDEA 2004 as to the Congressional intent regarding parents being permitted to proceed *pro se.*

Wherefore, the Winkelmans respectfully request this Honorable Court deny Parma's motion to dismiss.

Respectfully submitted,

/s/ Jeff Winkelman
Jeff Winkelman
Appearing pro se

/s/ Sandee Winkelman
Sandee Winkelman
Appearing pro se

1853 Jacqueline Drive
Parma, Ohio 44134

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion have been sent by regular U. S. mail to Christina Henagen Peer, Esq., Squire, Sanders and Dempsey L.L.P., 4900 Key Tower, 127 Public Square, Cleveland, Ohio 44114-1304, on this 20 day of July, 2005.

/s/ Sandee Winkelman
Sandee Winkelman

No. 04-4159

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JACOB Winkelman, a minor, by and through his parents and Legal Guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN,

Plaintiffs-Appellants,

v.

PARMA CITY SCHOOL DISTRICT,

Defendant-Appellee.

ORDER

(Filed Nov. 4, 2004)

Before: MERRITT, DAUGHTREY, and SUTTON, Circuit Judges.

The plaintiffs appeal the denial of their motion for a stay-put injunction in this action under the Individuals with Disabilities and Education Act ("IDEA"). They move for a stay and injunction pending appeal and also request an immediate, ex parte, temporary injunction pending consideration of their motion for an injunction pending appeal. The defendant opposes the motions for injunctive relief and moves to dismiss the appeal. The plaintiffs oppose the motion to dismiss.

The defendant moves to dismiss the appeal on several grounds. First, it argues that Jeff and Sandee Winkelman, as non-attorney parents, may not represent the interest of their minor child in federal court. Jeff and Sandee Winkelman may personally pursue their individual IDEA

claims in federal court. *See* 28 U.S.C. § 1654. This court has not addressed the question of whether parents may also personally pursue in federal court the IDEA claims of their minor children. There is a split in the circuits concerning whether parents, acting *pro* se, may enforce the substantive rights of their minor children in an IDEA action. *Compare Maroni v. Pemi-Baker Regional Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003) (permitting *pro se* representation), *with Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147, 1149 (7th Cir. 2001); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998). We will defer a ruling on this unsettled issue to the panel to be assigned to hear this appeal on the merits.

The defendant also moves to dismiss the appeal for lack of jurisdiction, arguing that the district court's order is not appealable and that the pendency of the plaintiffs' motion for reconsideration in the district court deprives this court of appellate jurisdiction. The district court's order denied the plaintiffs' request for an injunction setting forth the placement of the child, and is appealable under 28 U.S.C. § 1292(a)(1). *See, e.g., Wagner v. Board of Educ. of Montgomery County*, 335 F.3d 297 (4th Cir. 2003) (reviewing an IDEA stay-put preliminary injunction). The plaintiffs' motion for reconsideration was not filed within ten days of the entry of the order and does not affect the validity of the appeal. *See* Fed. R. App. P. 4(a)(4).

The plaintiffs seek an injunction pending appeal directing that the stay-put placement for the child be designated as the Achievement Center. They also request emergency temporary injunctive relief to the same effect. Fed. R. App. P. 8(a)(1) requires that a party first seek

injunctive relief pending appeal in the district court. Only if the district court declines to grant such relief or there is a showing that moving first in the district court would have been impracticable may a party move for a stay or injunction pending appeal in this court. Fed. R. App. P. 8(a)(2). The plaintiffs have not requested that the district court order a placement at the Achievement Center, and they cannot show that it would be impracticable to do so.

Therefore, the plaintiffs' motions for injunctive relief pending appeal are **DENIED** without prejudice to renewal, if necessary, following a ruling by the district court on an injunction pending appeal. The defendant's motion to dismiss for lack of jurisdiction is DENIED. The issue of whether Jeff and Sandee Winkelman, *acting pro se*, may represent the interests of their minor child in the appeal is referred to the panel to be assigned to hear the appeal on the merits.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green/JC
Clerk

H.R.1350

Individuals with Disabilities Education Improvement Act of 2004 (Enrolled as Agreed to or Passed by Both House and Senate)

SEC. 302. EFFECTIVE DATES.

(a) Parts A, B, and C, and subpart 1 of part D –

(1) IN GENERAL – Except as provided in paragraph (2), parts A, B, and C, and subpart 1 of part D, of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on July 1, 2005.

(2) HIGHLY QUALIFIED DEFINITION – Subparagraph (A), and subparagraphs (C) through (F), of section 602(10) of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on the date of enactment of this Act for purposes of the Elementary and Secondary Education Act of 1965.

(b) SUBPARTS 2, 3, AND 4 OF PART D – Subparts 2, 3, and 4 of part D of the Individuals with Disabilities Education Act, as amended by title I, shall take effect on the date of enactment of this Act.

(c) Education Sciences Reform Act of 2002 –

(1) NATIONAL CENTER FOR SPECIAL EDUCATION RESEARCH – Sections 175, 176, and 177 (other than section 177(c)) of the Education Sciences Reform Act of 2002, as enacted by section 201(a)(2) of this Act, shall take effect on the date of enactment of this Act.

(2) PLAN – Section 177(c) of the Education Sciences Reform Act of 2002, as enacted by section 201(a)(2) of this Act, shall take effect on October 1, 2005.

H.R.1350

Individuals with Disabilities Education Improvement Act of 2004 (Enrolled as Agreed to or Passed by Both House and Senate)

'SEC. 615. PROCEDURAL SAFEGUARDS.

'(a) ESTABLISHMENT OF PROCEDURES – Any State educational agency, State agency, or local educational agency that receives assistance under this part shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

'(b) TYPES OF PROCEDURES – The procedures required by this section shall include the following:

'(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

'(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of

the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of –

'(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

'(ii) an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)), the local educational agency shall appoint a surrogate in accordance with this paragraph.

'(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

'(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency –

'(A) proposes to initiate or change; or

'(B) refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

'(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

'(5) An opportunity for mediation, in accordance with subsection (e).

'(6) An opportunity for any party to present a complaint –

'(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

'(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

'(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential) –

'(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

'(ii) that shall include –

'(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

'(II) in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending;

'(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

'(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

'(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

'(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

'(c) NOTIFICATION REQUIREMENTS –

'(1) CONTENT OF PRIOR WRITTEN NOTICE – The notice required by subsection (b)(3) shall include –

'(A) a description of the action proposed or refused by the agency;

'(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment,

record, or report the agency used as a basis for the proposed or refused action;

'(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

'(D) sources for parents to contact to obtain assistance in understanding the provisions of this part;

'(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

'(F) a description of the factors that are relevant to the agency's proposal or refusal.

'(2) DUE PROCESS COMPLAINT NOTICE –

'(A) COMPLAINT – The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

'(B) RESPONSE TO COMPLAINT –

'(i) LOCAL EDUCATIONAL AGENCY RESPONSE –

'(I) IN GENERAL – If the local educational agency has not sent a prior written notice to the parent

regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include –

'(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

'(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

'(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

'(dd) a description of the factors that are relevant to the agency's proposal or refusal.

'(II) SUFFICIENCY – A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

'(ii) OTHER PARTY RESPONSE – Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

'(C) TIMING – The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

'(D) DETERMINATION – Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

'(E) AMENDED COMPLAINT NOTICE–

'(i) IN GENERAL – A party may amend its due process complaint notice only if –

'(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

'(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

'(ii) APPLICABLE TIMELINE – The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

'(d) PROCEDURAL SAFEGUARDS NOTICE –

'(1) IN GENERAL –

'(A) COPY TO PARENTS – A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents –

'(i) upon initial referral or parental request for evaluation;

'(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

'(iii) upon request by a parent.

'(B) INTERNET WEB SITE – A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

'(2) CONTENTS – The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to –

'(A) independent educational evaluation;

'(B) prior written notice;

'(C) parental consent;

'(D) access to educational records;

'(E) the opportunity to present and resolve complaints, including –

'(i) the time period in which to make a complaint;

'(ii) the opportunity for the agency to resolve the complaint; and

'(iii) the availability of mediation;

'(F) the child's placement during pendency of due process proceedings;

'(G) procedures for students who are subject to placement in an interim alternative educational setting;

'(H) requirements for unilateral placement by parents of children in private schools at public expense;

'(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

'(J) State-level appeals (if applicable in that State);

'(K) civil actions, including the time period in which to file such actions; and

'(L) attorneys' fees.

'(e) MEDIATION –

'(1) IN GENERAL – Any State educational agency or local educational agency that receives assistance under this part shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a

complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

'(2) REQUIREMENTS – Such procedures shall meet the following requirements:

'(A) The procedures shall ensure that the mediation process –

'(i) is voluntary on the part of the parties;

'(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part; and

'(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

'(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY – A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

'(i) a parent training and information center or community parent resource center in the State established under section 671 or 672; or

'(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

'(C) LIST OF QUALIFIED MEDIATORS – The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

'(D) COSTS – The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

'(E) SCHEDULING AND LOCATION – Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

'(F) WRITTEN AGREEMENT – In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that –

'(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

'(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

'(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

'(G) MEDIATION DISCUSSIONS – Discussions that occur during the mediation process shall be confidential and may not be

used as evidence in any subsequent due process hearing or civil proceeding.

'(f) IMPARTIAL DUE PROCESS HEARING –

'(1) IN GENERAL –

'(A) HEARING – Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

'(B) RESOLUTION SESSION –

'(i) PRELIMINARY MEETING – Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint –

'(I) within 15 days of receiving notice of the parents' complaint;

'(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

'(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

'(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

'(ii) HEARING – If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part shall commence.

'(iii) WRITTEN SETTLEMENT AGREEMENT – In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is –

'(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

'(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

'(iv) REVIEW PERIOD – If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

'(2) DISCLOSURE OF EVALUATIONS AND RECOMMENDATIONS –

'(A) IN GENERAL – Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

* * *

Taken from Section 615(i) of H.R. 1350, as passed by the Senate 5/13/04.

(4) PARENTS REPRESENTING THEIR CHILDREN IN COURT – Subject to subsection (m), and notwithstanding any other provision of Federal law regarding attorney representation (including the Federal Rules of Civil Procedure), a parent of a child with a disability may represent the child in any action under this part in Federal or State court, without the assistance of an attorney.

Excerpt from Senate Report 108-185

Parents representing their children in civil actions

The statutory language of IDEA makes clear that a parent has a right to file a due process complaint and to have the

opportunity for a due process hearing. It is unquestioned that parents have the right to bring a complaint and participate in a due process hearing without an attorney.

However, there has been disagreement as to whether a parent may, in effect, 'represent' their child in a civil action that results from an appeal of a due process hearing. The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have decided this issue based upon a distinction between procedural and substantive claims brought by a parent.

Both Federal and State laws generally prevent a non-attorney parent from representing his or her child in a court proceeding, as these laws provide that a person can only represent himself or herself, and not proceed on behalf of their minor child. Moreover, it is well-settled law that a minor is disqualified from representing himself or herself in a civil action.

A parent who does not have the financial resources to hire an attorney, but yet does not meet the financial need criteria for court-appointed counsel, or who cannot find an attorney to take their case on a contingency basis, has no ability to protect their child's interests if they are disallowed from going to court. This seems particularly unfair if a school district, rather than the parent, appeals a due process hearing decision to State or Federal court.

It makes little sense if the parents who are explicitly permitted to invoke administrative remedies and to exhaust them could not be parties for purposes of bringing suit. IDEA relies upon the central role played by parents in assuring that their child with a disability receives a free appropriate public education.

Based on current statutory language and on the rich legislative history emphasizing the importance of parental involvement, the committee believes that parents have a right to represent their child in court, without a lawyer, for purposes of IDEA law, regardless of whether their claims involve procedural or substantive issues. Therefore, the committee has amended section 615(i)(2) to clarify that a parent of a child with a disability may represent the child in any action under this part in State or Federal court, without the assistance of an attorney. The committee makes clear that this provision applies only to civil actions brought under IDEA as a result of an

* * *

H.R.1350

Individuals with Disabilities Education Improvement Act of 2004 (Enrolled as Agreed to or Passed by Both House and Senate)

'(B) FAILURE TO DISCLOSE – A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

'(3) LIMITATIONS ON HEARING –

'(A) PERSON CONDUCTING HEARING – A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum –

'(i) not be –

'(I) an employee of the State educational agency or the local educational

agency involved in the education or care of the child; or

'(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

'(ii) possess knowledge of, and the ability to understand, the provisions of this title, Federal and State regulations pertaining to this title, and legal interpretations of this title by Federal and State courts;

'(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

'(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

'(B) SUBJECT MATTER OF HEARING – The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

'(C) TIMELINE FOR REQUESTING HEARING – A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.

'(D) EXCEPTIONS TO THE TIMELINE – The timeline described in subparagraph (C) shall not

apply to a parent if the parent was prevented from requesting the hearing due to –

'(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

'(ii) the local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

'(E) DECISION OF HEARING OFFICER –

'(i) IN GENERAL – Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

'(ii) PROCEDURAL ISSUES – In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

'(I) impeded the child's right to a free appropriate public education;

'(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

'(III) caused a deprivation of educational benefits.

'(iii) RULE OF CONSTRUCTION – Nothing in this subparagraph shall be construed

to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

'(F) RULE OF CONSTRUCTION – Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

'(g) APPEAL –

'(1) IN GENERAL – If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

'(2) IMPARTIAL REVIEW AND INDEPENDENT DECISION – The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

'(h) SAFEGUARDS – Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded –

'(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

'(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

'(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

'(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which fmdings and decisions –

'(A) shall be made available to the public consistent with the requirements of section 617(b) (relating to the confidentiality of data, information, and records); and

'(B) shall be transmitted to the advisory panel established pursuant to section 612(a)(21).

'(i) ADMINISTRATIVE PROCEDURES –

'(1) IN GENERAL –

'(A) DECISION MADE IN HEARING – A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

'(B) DECISION MADE AT APPEAL – A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

'(2) RIGHT TO BRING CIVIL ACTION –

'(A) IN GENERAL – Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall

have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

'(B) LIMITATION – The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part, in such time as the State law allows.

'(C) ADDITIONAL REQUIREMENTS – In any action brought under this paragraph, the court –

'(i) shall receive the records of the administrative proceedings;

'(ii) shall hear additional evidence at the request of a party; and

'(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

'(3) JURISDICTION OF DISTRICT COURTS; ATTORNEYS' FEES –

'(A) IN GENERAL – The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

'(B) AWARD OF ATTORNEYS' FEES –

'(i) IN GENERAL – In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs –

'(I) to a prevailing party who is the parent of a child with a disability;

'(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

'(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

'(ii) RULE OF CONSTRUCTION – Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

'(C) DETERMINATION OF AMOUNT OF ATTORNEYS' FEES – Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

'(D) PROHIBITION OF ATTORNEYS' FEES AND RELATED COSTS FOR CERTAIN SERVICES –

'(i) IN GENERAL – Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if –

'(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

'(II) the offer is not accepted within 10 days; and

'(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

'(ii) IEP TEAM MEETINGS – Attorneys' fees may not be awarded relating

to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

'(iii) OPPORTUNITY TO RESOLVE COMPLAINTS – A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered –

'(I) a meeting convened as a result of an administrative hearing or judicial action; or

'(II) an administrative hearing or judicial action for purposes of this paragraph.

'(E) EXCEPTION TO PROHIBITION ON ATTORNEYS' FEES AND RELATED COSTS – Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

'(F) REDUCTION IN AMOUNT OF ATTORNEYS' FEES – Except as provided in subparagraph (G), whenever the court finds that –

'(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

'(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing

in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

'(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

'(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

'(G) EXCEPTION TO REDUCTION IN AMOUNT OF ATTORNEYS' FEES – The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

'(j) MAINTENANCE OF CURRENT EDUCATIONAL PLACEMENT – Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

'(k) PLACEMENT IN ALTERNATIVE EDUCATIONAL SETTING –

'(1) AUTHORITY OF SCHOOL PERSONNEL –

'(A) CASE-BY-CASE DETERMINATION – School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

'(B) AUTHORITY – School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

'(C) ADDITIONAL AUTHORITY – If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) although it may be provided in an interim alternative educational setting.

'(D) SERVICES – A child with a disability who is removed from the child's current

placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall –

'(i) continue to receive educational services, as provided in section 612(a)(1), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

'(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

'(E) MANIFESTATION DETERMINATION –

'(i) IN GENERAL – Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –

'(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

'(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

'(ii) MANIFESTATION – If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

'(F) DETERMINATION THAT BEHAVIOR WAS A MANIFESTATION – If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall –

'(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

'(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a

behavioral intervention plan, and modify it, as necessary, to address the behavior; and

'(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

'(G) SPECIAL CIRCUMSTANCES – School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child –

'(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

'(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

'(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

'(H) NOTIFICATION – Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

'(2) DETERMINATION OF SETTING – The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1)

* * *

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JACOB Winkelman, a minor, by and through his parents and Legal Guardians, Jeff and Sandee Winkelman; JEFF WINKELMAN; SANDEE WINKELMAN, Plaintiffs-Appellants, v. PARMA CITY SCHOOL DISTRICT, Defendant-Appellee.	) CASE NO. 05-3886)))) **APPELLEE'S REPLY TO APPELLANTS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**)))

I. INTRODUCTION.

Plaintiffs-Appellants Jeff and Sandee Winkelmans' ("the Winklemans") Opposition to the Defendant-Appellee Parma City School District Board of Education's ("Parma" or "District") motion to dismiss fails to overcome the fact that they may not proceed *pro se* with their appeal under the Individuals with Disabilities Education Act ("IDEA"). Instead, they misconstrue the binding effect of this Court's decision in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005) as well as the *Cavanaugh* court's rationale. Therefore, this Court should dismiss the Winkelmans' appeal with prejudice unless they obtain counsel within a reasonable time.

II. THE WINKELMANS OFFER NO COMPELLING LEGAL AUTHORITY TO OVERCOME THE FACT THAT THEY CANNOT REPRESENT THEIR CHILD PRO SE IN FEDERAL COURT UNDER THE IDEA.

As this Court recently found in *Cavanaugh v. Cardinal Local Sch. Dist.*, the well-settled prohibition on non-attorney parents representing the interests of their children in court extends to judicial proceedings arising under the IDEA. *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), *reh'g denied* 2005 U.S. App. LEXIS 8867 (June 15, 2005). Here, the *Cavanaugh* decision is directly on point and must be followed. The Winkelmans' assertion that the *Cavanaugh* decision is distinguishable because the "merits" of their appeal "are very different from that of Cavanaugh," (Opposition at 2), is misguided. The *Cavanaugh* court did not address the merits of the Cavanaughs' appeal but instead found that the language of the IDEA does not allow ***any*** non-lawyer parent to proceed *pro se* in IDEA judicial proceedings. *Id.* at *4-8.

Likewise, the Winkelmans' argument that the 2004 amendments to the IDEA require this panel to reach a different result than the *Cavanaugh* court is also unavailing. First, it is well-settled that "A panel of this court may not reverse a prior published decision of another panel. Only an en banc panel of the court may reverse a published decision." *Naturalite v. Ciarlo*, 22 Fed. Appx. 506, 507 (6th Cir. 2001) *citing* Sixth Circuit Rule 206(c).[1] Further, the reauthorized IDEA provides no basis to

[1] Moreover, the Cavanaughs requested a rehearing but their petition for rehearing was denied. *Cavanaugh v. Cardinal Local Sch. Dist.*, 2005 U.S. App. LEXIS 8867 (6th Cir. June 15, 2005).

overturn the *Cavanaugh* decision. The Winkelmans argue that this Court should reevaluate the *Cavanaugh* decision because the amended IDEA did not add an express provision preventing non-attorney parents from proceeding *pro se* in judicial proceedings. The Winkelmans, however, misconstrue the *Cavanaugh* court's rationale. In finding that non-lawyer parents may not represent their children in court actions under the IDEA, the *Cavanaugh* court reasoned:

> The Cavanaughs can point to no language in the IDEA that abrogates the common law rule that non-lawyers may not represent litigants in court. ***To the contrary, the language of the IDEA evidences a congressional intent to prohibit non-lawyer parents from representing their minor children in suits brought under its provisions. The IDEA explicitly grants parents the right to a due process hearing as part of the administrative proceedings provided for by the statute, and the regulations provide to the parents the right to present evidence and examine witnesses on behalf of the child in such a proceeding.*** 20 U.S.C. § 1415(f)(1); 34 C.F.R. § 303.422(b)(2). ***In stark contrast, the provision of the IDEA granting "[a]ny party aggrieved" access to the federal courts, 20 U.S. C§ 1415(i)(2)(A), makes no mention of parents whatsoever.*** Applying the canon of *expressio unius est exclusio alterius*, which says that the mention of one thing implies the exclusion of another, *Millsaps v. Thompson*, 259 F.3d 535, 546 (6th Cir. 2001), we conclude that the IDEA does not grant parents the right to represent their child in federal court.

Id. at *4-8 (emphasis added).

Significantly, as before, Section 1415 of the reauthorized IDEA still "makes no mention" of parents.[2] Notably, the procedural provisions of the reauthorized IDEA expressly grant non-attorney parents the right to proceed *pro se* at the ***administrative level*** while failing to grant non-attorney parents a corresponding right to proceed *pro se* in ***judicial proceedings.***[3] Indeed, as the Winkelmans correctly note, the reauthorized IDEA "le[ft] the procedural provisions ***unchanged*** as to the rights of parents to represent their handicapped children's interests in IDEA cases." (Opposition at 2) (emphasis added). Therefore, the amendments to the IDEA do not conflict with the *Cavanaugh* court's rationale and do not provide a basis to overturn the *Cavanaugh* decision.

III. CONCLUSION.

For the foregoing reasons, Defendant-Appellee, the Parma City School District Board of Education, respectfully requests that this Court give the Plaintiffs-Appellants Jeff and Sandee Winkelman a reasonable time to obtain counsel and dismiss their appeal with prejudice if they fail to do so.

---

[2] Specifically, just as it did before the 2004 amendments, 20 U.S.C. § 1415(i)(2)(A) still provides "Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A).

[3] *See* 20 U.S.C. § 1415(f)(1); 20 U.S.C. § 1415(i)(2)(A).

Respectfully submitted

/s/ Christine Tomko Cossler
Christina Henagen Peer (0071579)
CPeer@ssd.com
Christine Tomko Cossler (0075340)
CCossler@ssd.com
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500 Telephone
(216) 479-8795 Facsimile

Attorneys for Defendant-Appellee Parma City School District

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2005, a copy of the foregoing Appellee's Reply to Appellants' Memorandum in Opposition to Motion to Dismiss was sent by U.S. mail to Mr. and Mrs. Jeff Winkelman, 1853 Jacqueline Drive, Parma, Ohio 44134.

/s/ Christine Tomko Cossler
One of the Attorneys for
Defendant-Appellee
Parma City School District

FILED
APR 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN *et al.*, *Petitioners,*

v.

PARMA CITY SCHOOL DISTRICT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

JEAN-CLAUDE ANDRE
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Avenue
Los Angeles, CA 90034
Tel./Fax: (310) 558-0932

TABLE OF CONTENTS

Table of Contents i

Table of Cited Authorities ii

Reply Brief for the Petitioners 1

A. The Three-Way 1-4-1 Split Among the Circuits Is Real, Intractable, and Warrants Immediate Intervention 2

B. Nothing About this Case Would Result in a Fact-Bound Decision from the Court or Prohibit It from Deciding the Question Presented 7

C. Respondent's Merits-Based Arguments Only Highlight the Need for This Court's Prompt Intervention 10

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES:

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) ... 6

Cavanaugh v. Cardinal Local Sch. Dist.
409 F.3d 753 (CA6 2005) 1-5

Cavanaugh v. Cardinal Local Sch. Dist.
150 Fed. Appx. 386 (CA6 2005) 4

D.K. v. Huntington Beach Union High Sch. Dist., Slip Op.
Case No. SACV 05-341-CJC (RNBx)
(C.D. Cal. Mar. 22, 2006) 6-7

Lockhart v. United States, 126 S.Ct. 699 (2005) 6

Maroni v. Pemi-Barker Reg'l Sch. Dist.
346 F.3d 247 (CA1 2003) 1, 5-7

Mead Corp. v. Tilley, 490 U.S. 714 (1989) 6

Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 6

Russell v. Dep't of Educ., No. 04-15482
(CA9 docketed Mar. 12, 2005) 8-9

Russell v. Dep't of Educ., Minutes
No. CV 03-654 HG-BMK (D. Haw. Jan. 28, 2004) ... 9

Sand v. Milwaukee Pub. Sch., No. 03-C-1014
(E.D. Wis. filed Oct. 16, 2003) 8

TABLE OF AUTHORITIES-Continued

Page

Trailmobile Co. v. Whirls, 331 U.S. 40 (1947) 6

United States v. Craft, 535 U.S. 274 (2002) 6

Will v. Harlock, 126 S.Ct. 952 (2006) 8

Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan 402 F.3d 67 (CA1 2005) 5

STATUTES AND RULES:

20 U.S.C. § 1415(b)(1) 4

28 U.S.C. § 1254(1) 7

Federal Rule of Civil Procedure 60(b) 4

Supreme Court Rule 32.3 3

MISCELLANEOUS:

Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 2004*, Supp. Tbl. S-1 *available at* http://www.uscourts.gov/judbus2004/tables/s1.pdf 5

Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. App. Prac. & Process 29 (2001) ... 5

TABLE OF AUTHORITIES-Continued

Page

Def. Mot. S.J., *Sand v. Milwaukee Pub. Sch.* No. 03-C-1014 (E.D. Wis. Sep. 20, 2005) *available at* 2005 WL 2979427 9

Opening Br., *Cavanaugh v. Cardinal Local Sch. Dist.* No. 03-4231 (CA6 Dec. 3, 2003) 3

Opening Br., *Russell v. Dep't of Educ.*, No. 04-15482 (CA9 Jul. 16, 2004), *available at* 2004 WL 1948965 .. 9

Reply Br., *Cavanaugh v. Cardinal Local Sch. Dist.* No. 03-4231 (CA6 Aug. 13, 2004) 3

Robert L. Stern et al., Supreme Court Practice (8th ed. 2002) 7

REPLY BRIEF FOR THE PETITIONERS

As the petition, supplemental brief, and *amicus* briefs demonstrate, the question presented is exceedingly important to the effective enforcement of the Individuals with Disabilities in Education Act ("IDEA"). The IDEA's promise of a free appropriate public education ("FAPE") will be stripped of its vitality if parents of disabled children who cannot afford a lawyer, or who cannot locate a willing lawyer, are not allowed to prosecute an IDEA case *pro se* in federal court. Respondent has not, and cannot, contest the overriding importance of the question presented to the millions of disabled children requiring special education services – more than 66% of whom live in families earning $50,000 or less. *See* Pet. at 15. The importance of the question presented alone, even apart from the circuit split over it, warrants this Court's review.

While acknowledging the circuit split, *see* BIO at 19, 23, respondent attempts to down-play it by manipulating the Sixth Circuit's decision below and its prior decision in *Cavanaugh v. Cardinal Local School District*, 409 F.3d 753 (CA6 2005) ("*Cavanaugh I*"). *See* BIO at 19-22. Respondent also argues that Congress' recent rejection of an amendment that would resolve the circuit split demonstrates that the First Circuit's decision in *Maroni v. Pemi-Barker Regional School District*, 346 F.3d 247 (CA1 2003), was an erroneous outlier that the First Circuit will soon correct on its own, *see* BIO at 23-24. As we show below, respondent's attempts to limit *Cavanaugh I* and the decision below are belied by their clear holdings, by the Sixth Circuit's subsequent applications of *Cavanaugh I*, and by *Cavanaugh I*'s underlying record. Respondent's speculation that the First Circuit may revisit *Maroni* in light of Congress' recent inaction ignores the minuscule odds that any issue will be revisited by that court, the minuscule odds that the *pro se* issue will be presented to that court again, and this Court's oft-repeated maxim that legislative inaction is no indicator of statutory meaning or legislative intent.

Respondent also attempts to characterize this case as an improper vehicle for deciding the question presented. But none of its assertions, even if factually correct, establishes that there are any impediments to this Court conclusively deciding the important question of federal law presented that continues to divide the lower federal courts.

A. The Three-Way 1-4-1 Split Among the Circuits Is Real, Intractable, and Warrants Immediate Intervention

As noted in the petition, six courts of appeals have aligned themselves in a three-way 1-4-1 split over the question presented: The First Circuit places no restrictions on a parent's right to prosecute an IDEA case *pro se*; the Second, Third, Seventh, and Eleventh Circuits allow a *pro se* parent to prosecute only their own procedural IDEA claims; and the Sixth Circuit – in *Cavanaugh I* and the order below – have imposed an absolute bar on parents appearing *pro se*. *See* Pet. at 11-13. Respondent attempts to recast the split from a three-way 1-4-1 split to a two-way 1-5 split by limiting *Cavanaugh I* and the order below and aligning them with the position taken by the Second, Third, Seventh, and Eleventh Circuits. *See* BIO at 19-22. Respondent's attempt to manipulate *Cavanaugh I* and the decision below is unavailing.

Cavanaugh I could not be clearer in its holding that "*any* right on which [parents] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent upon the [parents'] proceeding through counsel, with their appeal on [their child's] behalf." 409 F.3d at 757 (emphasis added). The *Cavanaugh* panel reached this holding after expressly acknowledging "that the IDEA does grant parents of disabled students a narrow set of procedural rights." *Id.* Nonetheless, it held that these rights are "derivative" of the

child's right to a FAPE and, therefore, incapable of being litigated by a *pro se* parent in federal court.[1] *See id.*

Additionally, contrary to respondent's suggestion that no court has applied *Cavanaugh I* to impose an absolute bar to *pro se* representation, *see* BIO at 22 & n.19, the Sixth Circuit has done so twice: first, when the same panel that issued the *Cavanaugh I* opinion applied it in the panel's subsequent decision on the merits of the *Cavanaugh* appeal;[2] and second,

---

[1] The fact that the Sixth Circuit noted the IDEA's provision of procedural rights to parents is not surprising, given that, contrary to respondent's assertion, *see* BIO at 19 ("In *Cavanaugh*, no procedural violations were at issue."), the Cavanaughs' procedural IDEA claims were before the Sixth Circuit when it issued its opinion.

The Cavanaughs' merits briefs, which, as we show in the following paragraph, were before the panel when it issued its *Cavanaugh I* opinion, are littered with allegations that the school district violated their own procedural IDEA rights as parents. Among other procedural violations of the IDEA, the Cavanaughs argued that the school did "not inform[] the parents of their rights to an Independent Evaluation * * * and more importantly [did] not invit[e] the parents to an administrative review," and that the school conducted "evaluations and meetings that excluded the input of the parents." Opening Br. at 1-2, *Cavanaugh v. Cardinal Local Sch. Dist.*, No. 03-4231 (CA6 Dec. 3, 2003); *see also id.* at 4 n.7, 5, 11, 18, 21-22, 25; Reply Br. at iv, v, xi, 3 & n.1, 4, 5, 7, 8, 9, 11, 16, 20, *Cavanaugh v. Cardinal Local Sch. Dist.*, No. 03-4231 (CA6 Aug. 13, 2004). [Pursuant to Supreme Court Rule 32.3, on April 18, 2006, we submitted to the Clerk a letter requesting permission to lodge these briefs with the Court. Although permission had not been granted as of the printing of this brief, it is our hope that permission is granted by the time the Court considers the petition.]

The school district's motion to dismiss the Cavanaughs' appeal was referred to the merits panel on June 21, 2004. Briefing of the merits was completed on August 12, 2004. Over eight months later, on April 29, 2005, the case was submitted for decision. The panel issued its *Cavanaugh I* opinion on May 18, 2005, choosing to dismiss the appeal *in its entirety* rather than adjudicate the merits or allow the Cavanaughs to press their own procedural claims. As these dates demonstrate, both the Cavanaughs' procedural IDEA rights and Kyle's substantive IDEA rights were before the panel when it issued its opinion.

[2] In response to the Sixth Circuit's opinion, on June 17, 2005, the (continued...)

when a different panel applied it in the order on which certiorari is presently sought.

Respondent asserts that the order below applied *Cavanaugh I* only to "preclude[] [the Winkelmans] from pursuing their own substantive IDEA claims – not their procedural claims."[3] BIO at 22. Critically, however, in dismissing petitioners' *entire* appeal, *see* Pet. App. at 2a, and as respondent acknowledges, the court of appeals "made no mention of any procedural rights being asserted by Petitioners," BIO at 21. Rather, just as it held in *Cavanaugh I* that "*any* right on which [parents] could proceed on

---

(...continued)
Cavanaughs obtained counsel for their son Kyle but not for themselves. Shortly thereafter, they learned that the school district had "violated [additional] procedural requirements of the IDEA by withholding some of Kyle's scholastic records," *Cavanaugh v. Cardinal Local Sch. Dist.*, 150 Fed. Appx. 386, 387 (CA6 2005) ("*Cavanaugh II*") – a procedural violation for which the Cavanaughs indisputably had their own claim, *see* 20 U.S.C. § 1415(b)(1) (guaranteeing as a "procedural safeguard" the "opportunity for the parents of a child with a disability to examine all records relating to such child"). In an attempt to bring this newly-discovered claim before the district court, the Cavanaughs filed a *pro se* motion with the Sixth Circuit, seeking a stay of appellate proceedings while they attempted to supplement the record in the district court and obtain Federal Rule of Civil Procedure 60(b) relief from the district court's judgment. *See Cavanaugh II*, 150 Fed. Appx. at 388 & n.1. Even though the stay motion plainly related to the Cavanaughs' own procedural claim, the Sixth Circuit construed the motion as being on behalf of Kyle (or derivative of his right to a FAPE), cited to its prior opinion, and "decline[d] to consider" it. *Id.* (citing *Cavanaugh I*, 409 F.3d at 756). Under respondent's erroneous reading of *Cavanaugh I*, this would not have been possible.

[3] Notably, respondent asserts that the difference between allowing only a parent's procedural claims to go forward and dismissing an IDEA case in its entirety would be "of no practical consequence as parents alleging procedural violations may only recover under the IDEA if they show the procedural violation deprived the child of the substantive right to a FAPE." BIO at 22 n.18. This assertion is inconsistent with respondent's attempt to limit *Cavanaugh I* and the decision below. Indeed, it is this precise logic on which the Sixth Circuit based its holdings in *Cavanaugh I* and the decision below that parents may not prosecute their own procedural IDEA claims *pro se* in federal court.

their own behalf" is barred, 409 F.3d at 757 (emphasis added), the court of appeals unequivocally held below that the Winkelmans "are not permitted to represent their child in this court *nor can they pursue their own claims* pro se," Pet. App. at 2a (emphasis added). Nor is it of any moment that the court of appeals failed to make such a distinction because, when *Cavanaugh I* is read properly, it requires dismissal of the entire case – not just a child's substantive claims. Accordingly, the court of appeals' reliance on *Cavanaugh I* to order dismissal of petitioners' entire appeal was simply an act of faithful application to prior settled circuit precedent – precedent which created a three-way 1-4-1 split.

In a further attempt to down-play the split among the circuits, respondent argues that "the First Circuit may reconsider its position in a future case" in light of Congress' rejection of the proposed amendment to codify a parent's right to *pro se* representation. BIO at 23; *see also id.* at 14-15, 24. For two reasons, this argument is unavailing.

First, to overrule *Maroni*, a majority of the First Circuit's active judges would have to agree to hear a case raising the issue while sitting *en banc*. *See, e.g., Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 75 n.5 (CA1 2005). *En banc* review is rare nationally; it is particularly rare in the First Circuit, where in 2004, for example, only *one* of the First Circuit's 683 appeals was resolved *en banc*. *See* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 2004*, Supp. Tbl. S-1, *available at* http://www.uscourts.gov/judbus2004/tables/s1.pdf; *see also generally* Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. App. Prac. & Process 29 (2001). Moreover, the *pro se* issue will likely never come before the First Circuit again unless an educational agency determined to see *Maroni* overruled, moves for dismissal in the district court knowing that the motion will be denied, loses the case on the merits, appeals to the First Circuit

knowing that the panel will be bound by *Maroni*, and then seeks rehearing *en banc*.[4]

Second, respondents' suggestion that the First Circuit would revisit *Maroni* in light of Congress' inaction on the proposed 2004 IDEA amendment that would have expressly conferred a right to *pro se* representation is entirely misplaced. *See* BIO at 23-24; *see also id.* at 15-16. This Court has repeatedly refused to divine Congressional intent from such inchoate legislative acts because "'[f]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Lockhart v. United States*, 126 S.Ct. 699, 702 (2005) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002)); *see also, e.g., Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("'[M]ute intermediate legislative maneuvers' are not reliable indicators of congressional intent." (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947)); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws."); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that – silence").

Finally, respondent's repeated attempts to cast the First Circuit's decision as an outlier that is soon to be repudiated, *see* BIO at 23-24, is belied by the fact that the most recent federal decision on the question presented expressly follows it, *see D.K. v. Huntington Beach Union High Sch. Dist.*, Slip Op. at 8, Case No. SACV 05-341-CJC (RNBx) (C.D. Cal. Mar. 22, 2006) ("The

---

[4] Respondent's reliance on the fact that *Maroni* has not been applied subsequently by the First Circuit, *see* BIO at 23, is similarly misplaced. Educational agencies within the First Circuit certainly have had more pressing needs for their limited resources than paying their lawyers to set out on a time-consuming and costly expedition through the federal courts just to *try* to get *Maroni* overturned. As noted above, absent such an effort, there would have been no occasion for the First Circuit to apply *Maroni*.

Court is persuaded by the well-reasoned holding in *Maroni*, and rejects the reasoning of *Collingsgru* and *Cavanaugh*.").[5]

B. Nothing About this Case Would Result in a Fact-Bound Decision from the Court or Prohibit It from Deciding the Question Presented

A case will typically make a poor vehicle for deciding a legal issue when the issue is fact-bound, *see* Robert L. Stern et al., Supreme Court Practice 455 (8th ed. 2002) (suggesting that certiorari is unlikely when "the decision below turns upon its own facts" and, as a result, "will affect few others besides the litigants"); *accord, id.* at 459, or when other grounds for affirmance may preclude the Court from reaching the question presented, *see id.* at 455. Neither concern is present here.

First, respondent's arguments that this case is "a poor vehicle to resolve the *pro se* question because Petitioners have not been *pro se* throughout all the proceedings," BIO at 24, is irrelevant. This Court reviews only the decision of the court of appeals except in rare cases where the court of appeals is bypassed and review of the district court's judgment is sought. *See* 28 U.S.C. § 1254(1). As explained in the petition, this case did not bypass the court of appeals, *see* Pet. at 20-22, and this Court's review will be limited to the court of appeals' November 4, 2005, order dismissing this case because of petitioners' *pro se* status. Accordingly, the fact that petitioners were represented by counsel through most of the district court proceedings and at the conclusion of their related appeal has no bearing on this Court's ability to review the discrete legal question presented.

For the same reason, respondent's argument that "other less procedurally complex and factually complex cases would be more appropriate for certiorari" is unavailing. BIO at 25.

---

[5] At the time this brief was printed, the *D.K.* decision had not yet appeared on Westlaw or Lexis. In the meantime, it is available on the Central District of California's Case Management/Electronic Case Filing website, https://ecf.cacd.uscourts.gov/.

However complex the overall factual and procedural history of this case may be, the procedural and factual history relevant to the question presented is discrete and simple. The only fact germane to the legal issue presented here is that the court of appeals dismissed the underlying appeal because the Winkelmans attempted to appeal *pro se* the district court's denial of their own procedural IDEA claims and Jacob's substantive IDEA claims. Similarly, the only part of the record developed below that this Court need review is the court of appeals' two-page November 4, 2005, order dismissing petitioners' appeal. *See* Pet. App. at 1a-2a. All other underlying facts and all other documents from the record below, although providing context to the greater dispute between the parties, are legally irrelevant background noise.[6]

Respondent argues that either *Russell v. Dep't of Educ.*, No. 04-15482 (CA9 docketed Mar. 12, 2005), or *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. filed Oct. 16, 2003), "would be a better vehicle for certiorari" than this case. BIO at 26. *Russell* would not be a better vehicle than this case for deciding the question presented. Respondent claims that *Russell* would be preferable to this case because "the *pro se* question is the sole question on appeal." *Id.* But the same is true with

---

[6] Nor is respondent's suggestion that petitioners are unlikely to prevail on the merits before the Sixth Circuit any reason to deny review. *See* BIO at 29-30. Not only is respondent's suggestion speculative, but the underlying merits of the parties' dispute have nothing whatsoever to do with the question presented. The issue before the Court is "separable from, and collateral to, [the] rights asserted in the action." *Will v. Harlock*, 126 S.Ct. 952, 957 (2006) (quotations and citations omitted). To this end, even if respondent is correct that petitioners would not technically moot the *pro se* issue if they comply with the court of appeals' order and somehow obtain a lawyer to handle the merits of their appeal, *see* BIO at 29, the court of appeals' order is effectively final because it "conclusively resolv[es]" the *pro se* issue. *Will*, 126 S.Ct. at 957. If the court of appeals' order is allowed to stand, the damage to petitioners of either having their appeal dismissed or struggling to find money for a lawyer will be irremediable. If petitioners and other similarly situated parents of disabled children must face that Hobson's choice, it should only be after a decree from this Court on the merits of the *pro se* issue.

respect to this case as it case presently stands. The only question presently before the Court in this case is the *pro se* question.[7]

Respondent also suggests that the fact that the district court in *Russell* passed on the question, whereas the district court here did not, makes *Russell* a preferable vehicle. *See id.* As noted above, district court proceedings, aside from providing context, are irrelevant to this Court's review. Moreover, the *Russell* district court's two-page minute order dismissing the case and citing only two other cases, *see generally Russell v. Dep't of Educ.*, Minutes, No. CV 03-654 HG-BMK (D. Haw. Jan. 28, 2004), hardly makes *Russell* a better vehicle.

Respondent's assertion that *Sand* is a better vehicle is disingenuous. *See* BIO at 26. Although the *pro se* question is presented in *Sand*, it is implicated as one of four alternative grounds on which the defendants seek summary judgment. *See* Def. Mot. S.J. at 11-20, *Sand v. Milwaukee Pub. Sch.*, No. 03-C-1014 (E.D. Wis. Sep. 20, 2005), *available at* 2005 WL 2979427. There is no guarantee that, when the district court rules on the motion for summary judgment in *Sands*, it will dispose of the case on that ground or that the court of appeals – if the case even makes it that far – will pass upon the question.

---

[7] Indeed, *Russell* may be an inferior vehicle for deciding the question presented because, without the benefit of a decision from the Ninth Circuit, it is presently unclear whether that case presents both substantive and procedural claims. As explained by the Russells – who live in a remote corner of the "Big Island" of Hawai'i – the underlying dispute arose when the Hawai'i Department of Education (DOE) refused to reimburse them for the cost of transporting their disabled son to and from school, notwithstanding an agreement between the parties that the DOE would do so. *See* Opening Br. at 11, *Russell v. Dep't of Educ.*, No. 04-15482 (CA9 Jul. 16, 2004), *available at* 2004 WL 1948965. The due process hearing officer found that the DOE's refusal to reimburse the Russells was appropriate because the Russells allowed their car insurance to lapse. *See id.* at 11-12. The Russells appealed to federal court. *See id.* at 12. Although the Russells' right to reimbursement is quintessentially intertwined with their son's right to be transported to and from school at no cost to his parents, it does not appear that the Russells, unlike the Winkelmans, have their own procedural claims.

In sum, not only is respondent's claim that *Russell* and *Sand* are better vehicles factually wrong, it is entirely speculative: No one knows when, if at all, those cases will be presented to this Court for review. In the situation presented here – where a fully mature conflict in the circuits is squarely presented, and there is no chance that the issue as it affects the parties before the Court will be resolved without the Court's intervention – there is no reason to put off review for another day.

C. Respondent's Merits-Based Arguments Only Highlight the Need for This Court's Prompt Intervention

Respondent offers various merits-based arguments with which we disagree and to which there will be sufficient time to respond if this Court grants review. *See* BIO at 9-19. For present purposes, however, the significance of these arguments and their responses is that they replicate the fundamental differences among the lower federal courts that call out for this Court's prompt consideration and resolution. The time for that consideration and resolution is now.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the supplemental brief, the petition should be granted.

Respectfully submitted,

JEAN-CLAUDE ANDRE
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034

April 18, 2006

FILED
APR 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, *et al.*,
Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AUTISM SOCIETY OF AMERICA, NORTHERN VIRGINIA CHAPTER, COALITION OF TEXANS WITH DISABILITIES, DISABILITY LAW & ADVOCACY CENTER OF TENNESSEE, KENTUCKY PROTECTION AND ADVOCACY, PARENTADVOCATES.ORG, PARENTS FOR AUTISTIC CHILDREN'S EDUCATION, AND JEFF AND SHARON PODOWITZ, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ILISE L. FEITSHANS
120 Warwick Rd
Haddonfield, NJ 08033
(856) 428-0605

BARBARA E. ETKIND *
PRASHANT K. KHETAN
SLOAN J. PRESIDIO
ROSS, DIXON & BELL, LLP
2001 K Street, N.W.
Washington, D.C. 20006
(202) 662-2000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	3
I. THE QUESTION PRESENTED IS OF GREAT SIGNIFICANCE TO CHILDREN WITH DISABILITIES, THEIR PARENTS AND SOCIETY AS A WHOLE	4
A. Education Occupies a Position of Fundamental Importance in Our Society	4
B. Prohibiting Parents from Proceeding *Pro Se* to Assert Rights Under the IDEA Has a Detrimental Impact on Children with Disabilities	6
1. Children with Disabilities Are Dependent Upon Their Parents to Ensure that They Receive an Appropriate Education Under the IDEA	6
2. Many Parents Have no Choice but to Proceed *Pro Se* in Order to Enforce the Rights Granted by the IDEA	7
3. If Permitted to Stand, the Sixth Circuit's Decision Will Render Illusory Most of the Rights Provided by the IDEA	9
II. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER PARENTS CAN PROCEED *PRO SE* TO ASSERT RIGHTS UNDER THE IDEA	11

TABLE OF CONTENTS

Page

III. THE FIRST CIRCUIT'S RULING—THAT PARENTS HAVE BOTH SUBSTANTIVE AND PROCEDURAL RIGHTS UNDER THE IDEA THAT THEY MAY ENFORCE *PRO SE*—IS THE CORRECT ONE 13

A. The Substantive Rights Established under the IDEA Belong to the Parent and Child Jointly and are Inextricably Intertwined with the Procedural Rights that the IDEA Affords to Parents 14

B. The Sixth Circuit's Ruling is Inconsistent with and, Indeed, Thwarts Congress' Intent in Enacting the IDEA 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page

Abington Sch. District v. Schempp, 374 U.S. 203 (1963) 5
Board of Education v. Rowley, 458 U.S. 176 (1982) 6, 9, 10, 18
Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003) 19
Brown v. Board of Education, 347 U.S. 483 (1954) 4
Cavanaugh ex rel. Cavanaugh v. Cardinal Local Sch. District, 409 F.3d 753 (6th Cir. 2005) 13
Collinsgru v. Palmyra Board of Education, 161 F.3d 225 (3d Cir. 1998) 6, 7, 12, 14
Devine v. Indian River County Sch. Board, 121 F.3d 576 (11th Cir. 1997) 12
Diatta v. District of Columbia, 319 F. Supp. 2d 57 (D.D.C. 2004) 6
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 18
Haggar v. Helvering, 308 U.S. 389 (1940) 18
Heldman on Behalf of T.H. v. Sobol, 962 F.2d 148 (2d Cir. 1992) 15, 17
Knable v. Bexley City Sch. District, 238 F.3d 755 (6th Cir. 2001) 6
Maroni v. Pemi-Baker Reg'l. Sch. District, 346 F.3d 247 (1st Cir. 2003) ..... *passim*
Meyer v. Nebraska, 262 U.S. 390 (1923) 6
Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972) 15, 16
Navin v. Park Ridge Sch. District 64, 270 F.3d 1147 (7th Cir. 2001) 12
Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972) 15, 16

TABLE OF AUTHORITIES—Continued

Page

Plyler v. Doe, 457 U.S. 202 (1982) 5
Schaffer v. Weast, 126 S. Ct. 528 (2005) 6
United States v. Ryan, 284 U.S. 167 (1931) 18
Weber v. Cranston Sch. Committee, 212 F.3d 41 (1st Cir. 2000) 14
Wenger v. Canastota Central Sch. District, 146 F.3d 123 (2d Cir. 1998) 12
Winkelman v. Parma City Sch. District, 150 Fed. App'x. 406 (6th Cir. 2005) 3
Wisconsin v. Yoder, 406 U.S. 205 (1972) 4

STATUTES AND REGULATIONS

20 U.S.C. § 1400 ..... *passim*
20 U.S.C. § 1401 ..... 15, 17
20 U.S.C. § 1415 ..... 7, 11, 13, 14, 16, 17, 19
28 U.S.C. § 1654 13
34 C.F.R. Pt. 300 18

LEGISLATIVE HISTORY

121 Cong. Rec. 19,492 (1975) 10
150 Cong. Rec. S5250-02 (2004) 8
1975 U.S.C.C.A.N. 1425 (1975) 15, 16
H.R. Rep. 105-95 (1997) 6
H.R. Rep. 106-1040 (2001) 6
S. Rep. No. 94-168 (1975) 15, 16
S. Rep. No. 107-11 (2001) 6

MISCELLANEOUS

Melanie Archer, Ph.D., *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002* (December 2002) 19

TABLE OF AUTHORITIES—Continued

Page

Justin M. Bathon, *Defining "Parties Aggrieved" Under the Individuals with Disabilities Education Act: Should Parents be Allowed to Represent their Disabled Child Without an Attorney?*, 29 S. Ill. U.L.J. 507 (2005) 16

M. Brendhan Flynn, Note, *In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881 (2005)..... 10

Maroni v. Pemi-Baker Reg'l. Sch. Dist., No. 03-1407 (consolidated with No. 03-1700), Exhibits to Brief of *Amici Curiae*, The Disabilities Rights Center, Inc., and The National Association of Protection and Advocacy Systems (1st Cir. July 2003)) 8, 9

National Center for Education Statistics (reporting 2002 data), *available at* http://nces.ed.gov/programs/coe/2004/section2/table.asp?tableID=54 (last visited March 22, 2006)..... 5

National Center for Education Statistics (report ing 2003-04 school year), *available at* http://nces.ed.gov/programs/digest/d04/tables/dt04_052.asp (last visited March 22, 2006)..... 11

National Center for Education Statistics (reporting 2004 data), *available at* http://nces.ed.gov/programs/digest/d04/tables/ dt04_381.asp (last visited March 22, 2006)..... 5

National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education?* (July 2003) 7

Mary Wagner, *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS2)* (August 2003) 7, 8

TABLE OF AUTHORITIES—Continued

Page

Mary Wagner, *et al.*, *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students With Disabilities And Their Households* (September 2002) 7

IN THE

Supreme Court of the United States

No. 05-983

JACOB WINKELMAN, *et al.*,
Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AUTISM SOCIETY OF AMERICA, NORTHERN VIRGINIA CHAPTER, COALITION OF TEXANS WITH DISABILITIES, DISABILITY LAW & ADVOCACY CENTER OF TENNESSEE, KENTUCKY PROTECTION AND ADVOCACY, PARENTADVOCATES.ORG, PARENTS FOR AUTISTIC CHILDREN'S EDUCATION, AND JEFF AND SHARON PODOWITZ, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE* [1]

The Autism Society of America, Northern Virginia Chapter (ASA-NV) is a non-profit organization that provides support,

[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel to a party authored this brief in whole or in part and that no person other than the *amici curiae* and their members made a financial contribution towards the preparation and submission of the brief. Letters reflecting the consent of the parties have been lodged with the Court.

in the areas of education, vocational training and recreation, to families of those with autism. ASA-NV aids families in the collection and dissemination of information to parents, professionals and the general public, and fosters and reinforces awareness and respect for the rights of parents as the primary case managers in the lives of an autistic family member.

The Coalition of Texans with Disabilities is a public interest organization, founded in 1978 by people with disabilities, that provides advocacy services to people of all disabilities and ages.

Disability Law & Advocacy Center of Tennessee (DLAC) is a federally funded and authorized Protection and Advocacy organization that has provided advocacy services to people with disabilities in Tennessee since 1978. DLAC advocates for the educational rights of students and their parents under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA), through legal representation, training for individuals and groups and by providing support in individualized education program (IEP) development. DLAC also serves as a resource for private attorneys, government officials and school personnel.

Kentucky Protection and Advocacy (KPA) is an independent state agency that is the federally mandated Protection and Advocacy organization in Kentucky. KPA provides advocacy services to promote and protect the rights of individuals with disabilities, including the rights of parents and children to receive a free appropriate public education (FAPE) under the IDEA.

Parentadvocates.org is the d/b/a of the E-Accountability Foundation, a Section 501(c)(3) non-profit organization dedicated to informing parents and children of their legal rights and assisting in the processes required to obtain an appropriate educational program for every child.

Parents for Autistic Children's Education (PACE) is a not-for-profit membership organization that serves parents and guardians of children with autism or similar disorders in the Northern Virginia area. PACE advocates on behalf of children with autism and their families for high-quality, effective and scientifically based educational programs and to ensure school-system compliance with the IDEA.

Jeff and Sharon Podowitz (individually and on behalf of their minor son, Derek Podowitz) seek, for themselves and their minor son, the right to participate in special education adjudications and litigation without counsel.

The Court's decision in this case will have profound effects on whether children receive a free and *appropriate* public education under the IDEA. *Amici* regularly represent and/or advocate for the interests of children and parents in the ongoing pursuit of a FAPE. *Amici* have a significant interest in participating in this debate and wish to offer their unique perspective on the reasons why the Court should grant the petition.

REASONS FOR GRANTING THE PETITION

The IDEA was designed to ensure that all children with disabilities have access to a FAPE and to protect the rights of children *and* parents. 20 U.S.C. § 1400(d)(1)(B). The Sixth Circuit's ruling in this case, however, has written into the IDEA a condition precedent for bringing an action to ensure that children receive a FAPE that Congress did not intend. Specifically, in dismissing petitioners' case, the Sixth Circuit rejected the notion that the Winkelmans, as parents of a disabled child, had their own rights under the IDEA. *Winkelman v. Parma City Sch. Dist.*, 150 Fed. App'x. 406 (6th Cir. 2005). Instead, the Sixth Circuit has required parents of a disabled child to hire an attorney to assert the rights guaranteed by the IDEA in federal court.

The Sixth Circuit's ruling conflicts with the decisions of other courts of appeals that have addressed the issue. The First Circuit permits parents to raise both substantive and procedural rights under the IDEA in federal court *pro se*. *See Maroni v. Pemi-Baker Reg'l. Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003). Four other circuits have held that parents have procedural rights under the IDEA that they may assert in federal court *pro se*. This Court should grant the petition to resolve the conflict among the circuits in favor of the First Circuit's ruling by holding that parents, as "parties aggrieved" under the IDEA, have a right to assert both procedural and substantive IDEA claims *pro se* in federal court.

I. THE QUESTION PRESENTED IS OF GREAT SIGNIFICANCE TO CHILDREN WITH DISABILITIES, THEIR PARENTS AND SOCIETY AS A WHOLE.

A. Education Occupies a Position of Fundamental Importance in Our Society.

More than fifty years ago, in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), this Court declared the fundamental importance of education:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education * * * demonstrate our recognition of the importance of education to our democratic society. * * * In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493. The Court since has confirmed the vital role that education plays in maintaining the foundations of our democratic society. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) ("[A]s * * * pointed out early in our history, * * * some degree of education is necessary to prepare

citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) (recognizing "the public schools as a most vital civic institution for the preservation of a democratic system of government"). When an individual is deprived of an appropriate education, that deprivation works an "inestimable toll" on the "social[,] economic, intellectual, and psychological well-being of the individual," and poses an "obstacle * * * to individual achievement" that "make[s] it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

Moreover, in today's society, educational attainment plays a critical role in defining an individual's economic opportunities. For example, recent statistics illustrate that individuals who fail to complete high school face unemployment rates of 40%, *see* National Center for Education Statistics (reporting 2004 data), *available at* http://nces.ed.gov/programs/digest/d04/tables/ dt04_381.asp (last visited March 22, 2006), and earn approximately 25% less than high school graduates. *See* National Center for Education Statistics (reporting 2002 data), *available at* http://nces.ed.gov/programs/coe/2004/section2/ table.asp?tableID=54 (last visited March 22, 2006). Therefore, the failure to provide an appropriate education will further marginalize students with disabilities and will decrease the likelihood that they will have economically and socially productive lives.

B. Prohibiting Parents from Proceeding *Pro Se* to Assert Rights Under the IDEA Has a Detrimental Impact on Children with Disabilities.

1. *Children with Disabilities Are Dependent Upon Their Parents to Ensure that They Receive an Appropriate Education Under the IDEA.*

As this Court has recognized, "it is the natural duty of the parent to give his children education suitable to their station in life." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *see also Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 237 (3d Cir. 1998) (Roth, J., dissenting) (noting "the special nature of the relationship between parents and their children and * * * the role of parents in directing their children's education rights and opportunities"). For children with disabilities, the parental role is even more vital. Indeed, as Congress recognized, parental participation under the IDEA is critical to the development of an appropriate educational program for a child with a disability.

In drafting the IDEA, "Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, and in the formulation of the child's individual educational plan." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982) (citation omitted).[2] For example, the IDEA provides for extensive parental involvement in the development and revision of a

---

[2] In *Rowley*, this Court construed the Education for All Handicapped Children Act (EHA), the predecessor to the IDEA. *See, e.g.*, S. Rep. No. 107-11, at 22; H.R. Rep. 106-1040, at 66; *see also* H.R. Rep. 105-95, at 81 ("The EHA amendments of 1990, Public Law 101-476, renamed the statute as the Individuals with Disabilities Act"). This Court and other federal courts routinely rely interchangeably on cases that cite the IDEA and cases that cite the EHA. *See Schaffer v. Weast*, 126 S. Ct. 528, 531 (2005); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 764 (6th Cir. 2001); *Diatta v. District of Columbia*, 319 F. Supp. 2d 57, 62 (D.D.C. 2004).

child's IEP, authorizes parents to request due process hearings, allows parents to appeal adverse decisions to the state education agency and makes parents responsible for exhausting administrative remedies. 20 U.S.C. §§ 1415(b)(1), (f)(1), (g), (l). Children with disabilities thus are dependent upon their parents to ensure that they receive their right to a FAPE under the IDEA.

2. *Many Parents Have no Choice but to Proceed* Pro Se *in Order to Enforce the Rights Granted by the IDEA.*

Many parents of children with disabilities have no choice but to proceed *pro se* because obtaining legal representation is either too expensive or entirely unavailable. "Most attorneys will be reluctant to take on cases * * * characterized * * * by voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer." *Collinsgru*, 161 F.3d at 236.

Indeed, because a greater percentage of disabled children, as compared to the percentage of the general population, live below the poverty line, payment of a significant retainer is not an option available to many parents of children with disabilities. Mary Wagner, *et al.*, *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students With Disabilities And Their Households* at 28 (September 2002), *available at* http://www.seels.net/design docs/ SEELS_Children_We_Serve_Report.pdf (last visited March 22, 2006); National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education?* at 6 (July 2003), *available at* http://www.nichcy.org/ pubs/research/rb2.pdf (last visited March 22, 2006). Specifically, almost one quarter of children with disabilities are living in poverty, compared with 16 percent of children in the general population. *See id.* As a result, many parents of children with disabilities simply are unable to afford counsel. *See* Mary Wagner, *et al.*, *The Individual and Household*

Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS2) at 3-4 (August 2003), *available at* http://www.nlts2.org/dfs/w1c1_exec_sum-standalone.pdf (last visited March 22, 2006) (noting that parents of children with disabilities are 17 percent more likely to be unemployed); *see also* 150 Cong. Rec. S5250-02, S5351 (daily ed. May 12, 2004) (statement of Sen. Kennedy) ("Most parents don't have access to an attorney, or must rely on low-cost legal aid. And data from surveys shows that even this help is in short supply.").

Although advocacy organizations exist to provide legal assistance, they have extremely limited resources:

- The Arizona Center for Disability Law received (between 2000 and 2003) over 4800 requests and offered assistance to about 300 families. "[T]here is one private attorney in the State of Arizona who routinely accepts referrals in this area of the law."
- The Disability Law Project in Vermont notes that "there are four private practice attorneys who have accepted special education referrals with some regularity."
- The Michigan Protection and Advocacy Service received (between October 1999 and April 2003) 6,015 requests and provided representation in 14 percent of those requests. As of 2003, its referral list of private attorneys contained only 8 attorneys, none of whom was located in 80 of the 83 Michigan counties and none of whom was located in the 10 most populous cities in Michigan (based on the 1990 census figures).
- The Wisconsin Coalition for Advocacy can staff, on average, 25 percent of such cases; of the remaining 75 percent, less than 10 percent can find and afford attorney representation. "[T]here are fewer than 10 private attorneys in Wisconsin who will represent families in special education matters."

- The Disability Law Center in Boston, Massachusetts receives between 200 and 500 requests annually; "we were at best able to provide help to less than 10% of the families requesting help."
- The Disability Law Center of Alaska received (between 2000 and 2003) over 1,092 intakes, but opened only 183 cases.
- Kentucky Protection and Advocacy received (between 2000 and 2003) 2,739 requests and opened cases for 233 persons, declining the remaining 2,487 persons.

Maroni v. Pemi-Baker Reg'l. Sch. Dist., No. 03-1407 (consolidated with No. 03-1700), Brief of *Amici Curiae*, The Disabilities Rights Center, Inc., and The National Association of Protection and Advocacy Systems, Exs. 1, 4, 7, 8, 9, 10, 11 (1st Cir. July 2003).

3. *If Permitted to Stand, the Sixth Circuit's Decision Will Render Illusory Most of the Rights Provided by the IDEA.*

The Sixth Circuit's ruling, which prohibits parents from enforcing the rights afforded by the IDEA *pro se*, will have a detrimental impact on the very people sought to be protected under the IDEA—disabled children. As this Court has recognized, Congress passed the IDEA as "an ambitious federal effort to promote the education of handicapped children [due to] Congress' perception that a majority of handicapped children * * * were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out." *Rowley*, 458 U.S. at 179 (second brackets in original) (internal quotations omitted).[3] Indeed, Congress has made clear its belief that providing an appropriate education to children with

[3] *See* 20 U.S.C. § 1400(c)(2)(A), (B) (noting Congress' recognition that millions of children with disabilities were either excluded from or otherwise denied an appropriate public education).

disabilities would best serve society's interest. 20 U.S.C. § 1400(c) (setting forth Congress' findings in enacting IDEA); *Rowley*, 458 U.S. at 201 n.23 ("providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds") (quoting 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams)); *see also* 20 U.S.C. § 1400(c)(1) ("Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.").

Prohibiting parents from asserting IDEA claims *pro se* will result in the denial to many students of the right to receive an appropriate education solely because their parents are unable to afford or otherwise obtain legal counsel. "[W]here parents could not obtain representation or chose not to pay for counsel, many children with special needs would be precluded from exercising their statutory right to judicial review of their administrative due process hearings." *Maroni*, 346 F.3d at 257 (footnote omitted). Denying a parent's right to bring such an action would result in many children having no recourse when they have been unfairly denied a FAPE – a result that is contrary to the stated purpose of the IDEA. *See* M. Brendhan Flynn, Note, *In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881, 887-88 (2005) ("The importance of having a vigorous system of judicial review is apparent since states are lax in enforcing school compliance with the IDEA, some schools traditionally override parents' concerns about their child's IEP, and because due process hearings are skewed against poor children.") (citations omitted).

To put the issue into perspective, the Court's resolution of this issue will affect approximately 6.6 million disabled children that qualify for federally supported services under

the IDEA and related programs. This figure represents approximately 14 percent of all students enrolled in public schools, pre-kindergarten through the twelfth grade. *See* National Center for Education Statistics (reporting for 2003-04 school year), *available at* http://nces.ed.gov/programs/digest/d04/tables/ dt04_052.asp (last visited March 22, 2006).

II. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER PARENTS CAN PROCEED *PRO SE* TO ASSERT RIGHTS UNDER THE IDEA.

There is a significant three-way conflict among the courts of appeals concerning whether parents have the right to pursue IDEA claims *pro se* in federal court: one circuit has recognized parents' rights to bring both *procedural* and *substantive* claims *pro se* in federal court; four circuits have allowed parents to pursue claims for *procedural* violations only; and one circuit (the Sixth Circuit in this case) has completely barred parents from bringing IDEA claims *pro se*.

The First Circuit has recognized that parents may prosecute an IDEA case *pro se* "regardless of whether the rights asserted are *procedural* or *substantive*" because "[parents] are 'parties aggrieved' within the meaning of § 1415(i)(2)(A) of the IDEA." *Maroni*, 346 F.3d at 250. In reaching this conclusion, the First Circuit stated that the "parties aggrieved" provision in the IDEA does not draw any distinction between *procedural* and *substantive* rights. *Id.* at 253. The First Circuit added that courts drawing a distinction between procedural and substantive rights have created a distinction that Congress did not intend to include in the statute. *See id.* at 254 (noting that "none of the provisions of IDEA regarding the right of parents to seek relief in administrative or judicial hearings draws a distinction between substantive and procedural rights").

All but one of the other courts of appeals that have ruled on this issue (the Sixth Circuit in this case) have held that non-attorney parents are allowed to pursue claims asserting *procedural*, but not *substantive*, violations of the IDEA *pro se*. *See, e.g., Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124, 126 (2d Cir. 1998) (holding that "in federal court a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child" but a parent "is, of course, entitled to represent himself on his claims that his *own* rights as a parent under the IDEA were violated by the [school district's] failure to follow appropriate procedures") (internal quotations omitted); *Collinsgru*, 161 F.3d at 231, 233 (holding that "the right to proceed *pro se* in federal court does not give non-lawyer parents the right to represent their children in proceedings before a federal court," but the IDEA "clearly grants parents specific procedural rights, which they may enforce in administrative proceedings, as well as in federal court"); *Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147, 1149 (7th Cir. 2001) (per curiam) (holding that a parent "was free to represent himself, but as a non-lawyer he has no authority to appear as [his child's] legal representative"); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581-82 (11th Cir. 1997) (holding that parents who are not attorneys may not bring a *pro se* action on their child's behalf, but noting that a parent who is also a plaintiff may, in appropriate circumstances, be permitted to prosecute his own case without counsel).

Although these courts stopped short of permitting parents to raise substantive violations *pro se*, they acknowledged that the resolution of this issue was far from clear. *See, e.g., Collinsgru*, 161 F.3d at 235 ("[T]he language of the IDEA is unclear on its face. Some of its language can be read to suggest that Congress intended parents and children to share the underlying substantive right—that is, that Congress meant both to give children a substantive right to an appropriate

education and to give their parents the substantive right to have their children receive an appropriate education.").

Only the Sixth Circuit has taken the dramatically different approach of imposing a complete bar to *pro se* prosecution of IDEA claims in federal court. According to the Sixth Circuit's reasoning, a parent may not prosecute an IDEA case *pro se* because "any right on which [a parent] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent upon [the parents] proceeding, through counsel, with their appeal on [their child's] behalf." *Cavanaugh ex rel. Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 757 (6th Cir. 2005). For the reasons discussed in Part III below, this ruling is incorrect.

Given the lack of uniformity in the treatment of this issue, *amici* respectfully submit that the Court should grant the petition in order to resolve the question of what rights parents have under the IDEA and whether they can assert those rights in federal court *pro se*.

III. THE FIRST CIRCUIT'S RULING—THAT PARENTS HAVE BOTH SUBSTANTIVE AND PROCEDURAL RIGHTS UNDER THE IDEA THAT THEY MAY ENFORCE *PRO* SE—IS THE CORRECT ONE.

The right to sue provision in the IDEA states that "[*a*]*ny party* aggrieved by the findings and decision [made in a due process hearing] shall have the right to bring a civil action * * * in a district court of the United States without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A) (emphasis added). 28 U.S.C. § 1654 grants parties pursuing their own cause of action the right to proceed *pro se* in federal court. Therefore, according to the plain language of the statute, if parents are "parties aggrieved" within the meaning of § 1415(i)(2)(A), they have the right to proceed *pro se* in the federal courts.

The resolution of whether parents are "parties aggrieved" thus turns on whether parents have been granted their own rights under the IDEA. The First Circuit analyzed this issue correctly, concluding that parents have both procedural *and* substantive rights that can be asserted in federal courts *pro se*. *See Maroni*, 346 F.3d at 250 (holding that parents are "parties aggrieved" within § 1415(i)(2)(A) of the IDEA and have a right to proceed *pro se* regardless of whether the rights asserted are procedural or substantive). For the reasons set forth below, this decision is correct.

A. The Substantive Rights Established under the IDEA Belong to the Parent and Child Jointly and are Inextricably Intertwined with the Procedural Rights that the IDEA Affords to Parents.

The IDEA provides for substantive rights that are held jointly by children and parents (*i.e.*, students are entitled to receive appropriate educational services and parents are entitled to have their children receive those services at no cost). *See* 20 U.S.C. §1400(d)(1)(B) (noting that the main purpose of the IDEA is to "ensure that the rights of children with disabilities and *parents* of such children are protected") (emphasis added). This is a result of the special relationship between parents and their children and of the unique role parents play in directing their children's educational rights and opportunities. *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 51 (1st Cir. 2000) (noting "the central role played by parents in assuring that their disabled child receives a free appropriate public education") (internal quotations omitted); *see also Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting) (the rights under the IDEA "are the rights of both the parents and the children, and they are overlapping and inseparable. In enforcing their own rights under the Act, parents are also acting on behalf of their child.").

The text of the IDEA clearly provides that the right to a FAPE includes both the right of children to receive an appropriate education and the right of parents to have their children appropriately educated at no cost. *See* 20 U.S.C. § 1400(c)(3) (providing that "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities *and the families of such children* access to a free appropriate public education") (emphasis added); *see also* S. Rep. No. 94-168, at 6, 8, 10-11, 32, 41-42 (1975), as reprinted in 1975 USCCAN 1425, 1430, 1432, 1434-35, 1456, 1464-65 (1975) (noting that "[p]arents of [handicapped] children have the right to expect that individually designed instruction to meet their children's specific needs is available" and that the instruction would be provided at "no cost to the parents of a handicapped child"). The statutory definition of a FAPE in the IDEA emphasizes the requirement that services be provided at no cost to the parent. *Id.* § 1401(9) (noting that a FAPE includes "special education and related services" that "have been provided at *public expense*, under public supervision and direction, and *without charge*") (emphasis added).

The origins and underpinnings of the IDEA support this conclusion: The EHA/IDEA was developed in response to litigation regarding children with disabilities who were excluded from mainstream public schools and denied appropriate public educational services. *Heldman on Behalf of T.H. v. Sobol*, 962 F.2d 148, 154 (2d Cir. 1992) ("The legislative history of the [EHA] points to a pair of federal court cases involving challenges to the exclusion of disabled children from the public schools.") (discussing *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* (*PARC*), 343 F. Supp 279 (E.D. Pa. 1972); *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972)); *see also S. Rep. 94-168*, at 8-9 (1975), as reprinted in 1975 USCCAN 1425, 1432-33. Courts soon recognized that a school district's denial of services resulted

in parents either becoming obligated to pay for the educational services themselves or being forced to see their children forego any educational services at all. *See, e.g., PARC*, 343 F. Supp. at 283-86, 288; *Mills*, 348 F. Supp. at 869-70. Thus, early court decisions such as *PARC* and *Mills* ordered states to provide "free" public educational services to children with disabilities, relieving parents of the obligation to pay for these services and providing children with disabilities access to educational services at the public's expense, just like their non-disabled peers. *PARC*, 343 F. Supp. at 281-82, 302; *Mills*, 348 F. Supp at 878. That is, the courts held that imposing an obligation on parents to send their children to school created the parents' rights to have their children receive appropriate educational services at no cost.

In an effort to address the issues exposed in *PARC* and *Mills* at a national level, Congress passed the EHA, the predecessor to the IDEA.[4] 20 U.S.C. § 1400 (1990). In the EHA, Congress provided parents with a federal *substantive* right by requiring that students with disabilities be afforded the right to receive appropriate educational services free of charge, thus relieving parents of any obligation to pay for their child's educational needs. *Id.* § 1400(c); *S. Rep. No. 94-168*, at 6, 8, 10-11, 41-42 (1975), as reprinted in 1975 USCCAN at 1430, 1432, 1434-35, 1464. The substantive right to a free and appropriate education, at no cost to the

---

[4] Parents were permitted to assert their rights *pro se* under the EHA. *Maroni*, 346 F.3d at 250 (citing 20 U.S.C. § 1415(e)(2) (1994) (superseded 1997)). The EHA contained language similar to that of the IDEA—that only a "party aggrieved" can bring suit. *Compare* 20 U.S.C. § 1415(e)(2) (1994) (superseded 1997), *with* 20 U.S.C. § 1415(i)(2)(A); *see also* Justin M. Bathon, *Defining "Parties Aggrieved" Under the Individuals with Disabilities Education Act: Should Parents be Allowed to Represent their Disabled Child Without an Attorney?* 29 S. Ill. U.L.J. 507, 509 (2005) ("The language in the original [EHA] is identical to that of the present IDEA.") (citations omitted).

parent, remains in the IDEA today. 20 U.S.C. §§ 1400(d), 1401(9). It is a right shared jointly by the child and parent.

Moreover, the parents' substantive rights and procedural rights under the IDEA are "inextricably intertwined." *Maroni*, 346 F.3d at 255. Indeed, federal courts have recognized the essential interrelationship between the IDEA's procedural and substantive rights. *See, e.g., Heldman*, 962 F.2d at 155 ("IDEA's procedural guarantees * * * serve not only to guarantee the substantive rights accorded by the Act; the procedural rights, in and of themselves, form the substance of IDEA.").

This conclusion is consistent with the fact that Congress did not define a FAPE in the IDEA. *See* 20 U.S.C. § 1401(9) (requiring only that services be provided free of cost, include an appropriate preschool, elementary, and secondary education, meet state standards and comply with the individualized educational program). In drafting the IDEA, Congress chose instead to impose on parents the responsibility for enforcing a wide range of procedural protections designed to ensure that each child would receive an appropriate education formulated specifically for him or her. For example, in § 1415(a), the IDEA requires state educational agencies to "'establish and maintain procedures * * * to ensure that children with disabilities and their *parents* are guaranteed procedural safeguards with respect to the provision of [a FAPE].'" *Maroni*, 346 F.3d at 256 (alteration in original) (citation omitted). Moreover, the IDEA provides procedural protections to *parents*, not the child, in regard to the identification, evaluation and educational placement of the child.

Thus, the procedural rights provided for by Congress necessarily are intertwined with the substantive rights under the IDEA. Indeed, the substantive rights that Congress intended to provide would be meaningless without the procedural rights provided for by the IDEA. *See Maroni*, 346 F.3d at 255-56 ("IDEA's procedural protections are designed

to encourage parental involvement in the ultimate goal of having the child receive a free appropriate public education."); *see also Rowley*, 458 U.S. at 205-06 ("It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process * * * , as it did upon the measurement of the resulting IEP against a substantive standard.") (internal quotations omitted).

B. The Sixth Circuit's Ruling is Inconsistent with and, Indeed, Thwarts Congress' Intent in Enacting the IDEA.

The Sixth Circuit's denial of a parent's right to prosecute IDEA claims *pro se* overlooks a fundamental rule of statutory construction—a statute must be construed in a way that avoids absurd results. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Haggar v. Helvering*, 308 U.S. 389, 394 (1940); *United States v. Ryan*, 284 U.S. 167, 175 (1931).

As set forth above, the Sixth Circuit's ruling has no basis in the text of the IDEA, which does not require attorney representation to effectuate any of the enforcement mechanisms contained in the IDEA. The ruling is also inconsistent with Congress' intent in enacting the statute. For example, after finding that an attorney's presence could manifest an adversarial relationship between parents and a school district, Congress actually discouraged parents from obtaining counsel at the IEP level. *See Maroni*, 346 F.3d at 256; *see also* 34 C.F.R. Pt. 300, App. A., question 29 (2005). Additionally, once a dispute rises to the level of a due process hearing, the IDEA permits parents to have counsel accompany and advise

them, but does not require them to do so. *See* 20 U.S.C. § 1415(h)(1).[5]

There is an incongruity in a statutory reading that encourages parents to pursue the IEP process without an attorney and permits them to proceed at the due process hearing without representation, but then prohibits them from raising the same rights in the federal courts unless represented by an attorney. *Maroni*, 346 F.3d at 256-57 ("It would be odd for Congress to exclude parents from the definition of 'parties aggrieved' as to substantive claims, and thus force them to find attorney representation at the federal court level, after giving parents such a strong role at every other stage of the process."). It is simply illogical to suggest that Congress made it optional to have counsel at the IEP and due process levels, but then intended to require legal representation at the federal court level.

It is even more illogical to read the statute in a way that effectively renders meaningless an option that Congress wrote into the IDEA—the right to bring suit in state *or* federal court. *See* 20 U.S.C. § 1415(i)(2)(A). Indeed, a construction of 20 U.S.C. § 1415 which fails to recognize parents as parties in interest and, thus, precludes them from proceeding in federal court *pro se*, would create an unintended tactical advantage for school districts: a parent's right to litigate an IDEA action would be frustrated completely by a school district that is able to get the case into federal court. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691

---

[5] Most parents who request an impartial due process hearing are unrepresented by counsel. For example, in Illinois, in about one-half of the due process hearings between 1998 and 2002, the school district was represented by counsel but the parents had no such representation. Melanie Archer, Ph.D., *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002* (December 2002), *available at* http://www.dueprocessillinois.org/AccessDP.htm (last visited March 22, 2006).

(2003). For example, where the parents filed the case in state court, but could not afford to hire a lawyer or otherwise obtain one, a judgment in favor of the school district would be a foregone conclusion if the school district removed the case to federal court, where the parents would not be allowed to proceed *pro se*. Moreover, in cases where *pro se* parents prevailed at the administrative hearing level, school districts could secure reversals simply by filing an appeal in federal court because, without an attorney, a family would be prohibited from appearing to defend the administrative result. Surely, Congress did not intend such absurd results.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ILISE L. FEITSHANS
120 Warwick Rd
Haddonfield, NJ 08033
(856) 428-0605

Counsel for Jeff and Sharon Podowitz

* Counsel of Record

BARBARA E. ETKIND *
PRASHANT K. KHETAN
SLOAN J. PRESIDIO
ROSS, DIXON & BELL, LLP
2001 K Street, N.W.
Washington, D.C. 20006
(202) 662-2000

Counsel for Autism Society of America, Northern Virginia Chapter, Coalition of Texans with Disabilities, Disability Law & Advocacy Center of Tennessee, Kentucky Protection and Advocacy, Parentadvocates.org, Parents for Autistic Children's Education

Supreme Court, U.S.
FILED
APR 7 - 2006
OFFICE OF THE CLERK

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, *ET AL.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES INC., THE ARC OF THE UNITED STATES AND TASH IN SUPPORT OF PETITIONERS

LYNN S. PREECE
Counsel of Record
ERIN E. DOLLY
KELLY GOING
CHRISTOPHER J. KELLER
ERIN MCCLOSKEY MAUS
MARY M. RYAN
ANGELA C. VIGIL
BAKER & MCKENZIE LLP
130 E. Randolph Drive
Suite 3500
Chicago, IL 60601
(312) 816-8022

Counsel for Amici Curiae

200514

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Review by This Court Should Be Granted to Protect IDEA and to Resolve the Split Among the Circuits.	3
II. This Court Should Also Grant Certiorari Because the Present Circuit Split Disproportionately Affects Poor Families.	7
A. Disabled Children Are Over-Represented Among Poor Populations in the United States.	7
B. Parents Who Proceed *Pro Se* Are Often Unable to Find Lawyers.	9
C. Whether Parents May Represent Themselves and Their Children with Disabilities *Pro Se* Should Not Depend on the Family's Address.	12
D. The Court Should Grant Certiorari to Clarify that Parents Are Not Engaged in Unauthorized Practice of Law.	13
CONCLUSION	15

TABLE OF CITED AUTHORITIES

Page

Cases:

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 438 U.S. 176 (1982) 4, 5, 8, 14

Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003) 12

Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005), *reh'g denied*, 2005 U.S. App. LEXIS 12384 (6th Cir. June 15, 2005) 5

Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 (3d Cir. 1998) 4, 5, 6, 9, 12

C.O. v. Portland Pub. Sch., 406 F. Supp. 2d 1157 (D. Or. 2005) 4

Devine v. Indian Ridge County Sch. Bd., 121 F.3d 576 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998) 4, 7, 8

Faretta v. California, 422 U.S. 806 (1975) 5

Heldman v. Sobol, 962 F.2d 148 (2d Cir. 1992) ... 6

Honig v. Doe, 484 U.S. 305 (1988) 3

In re Arons, 756 A.2d 867 (Del. 2000) 13

Cited Authorities

Page

Kirkpatrick v. Lenoir County Bd. of Educ., 216 F.3d 380 (4th Cir. 2000) 3

Maroni v. Pemi-Baker Reg'l Sch. Dist., 346 F.3d 247 (1st Cir. 2003) ..... *passim*

Martinez v. Court of Appeal, 528 U.S. 152 (2000) ... 9

Meyer v. Nebraska, 262 U.S. 390 (1923) 6

Mosley v. Chicago Bd. of Educ., 434 F.3d 527 (7th Cir. 2006) 4

Navin v. Park Ridge Sch. Dist., 270 F.3d 1147 (7th Cir. 2001) 4

Schaffer v. Weast, 126 S. Ct. 528 (2005) 6, 7

Tcherepnin v. Knight, 389 U.S. 332 (1967) 6

Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999) 4

Statutes:

20 U.S.C. § 1400-1487 2

20 U.S.C. § 1400(c) 6

Cited Authorities

	Page
20 U.S.C. § 1400(d)	6
20 U.S.C. § 1415	6
28 U.S.C. § 1654	5
Rule:	
Fed. R. Civ. P. 17(c)	7
Other Authorities:	
American Bar Association, *Agenda For Access: The American People and Civil Justice*, 5 (1996)	9
Melanie Archer, *Access and Equity in Due Process, Attorney Representation and Hearing Outcomes in Illinois, 1997-2002* (Dec. 2002) <http://www.dueprocessillinois.org/AccessDP.htm>	11
M. Brendhan Flynn, *In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881 (2005)	7
Handicapped Children's Protection Act of 1986, S. Rep. No. 99-112 (1986)	13
Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU Educ. & L. J. 519 (2003)	8

Cited Authorities

Page

Income Level for Individuals Eligible for Assistance, 71 Fed. Reg. 5,012 (2006) 9

Individuals with Disabilities Education Act (IDEA) Data (visited March 30, 2006) <https://www.ideadata.org/tables28th/ar_1-1.htm> 13

National Council on Disability, *Back to School on Civil Rights* (Jan. 25, 2000), *http://www.ncd.gov/newsroom/publications/2000/*backtoschool_1.htm> 6

National Disability Rights Network (visited March 30, 2006) *http://www.NAPAS.org/aboutus/*PA_CAP.htm 10

Mary Wagner *et al.*, *The Children We Serve: Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002) <http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf> 8, 9

INTEREST OF AMICI CURIAE

The Council of Parent Attorneys and Advocates Inc. (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes that the key to effective educational programs for children with disabilities lies in collaboration between parents and educators as equal parties. To this end, COPAA does not undertake individual representation or advocacy for children with disabilities but provides training and resources for parents and attorneys to help each child obtain the free appropriate public education (FAPE) guaranteed by the Individuals with Disabilities Education Act ("IDEA").[1]

The Arc of the United States is the oldest and largest national organization for people with mental retardation and related developmental disabilities and their families. It was founded in 1950 by a group of parents and other concerned individuals, primarily to procure services for children who were denied a public school education. Today, *The Arc* works to ensure that the estimated 7.2 million Americans with mental retardation and related developmental disabilities have the services they need, including FAPE, in order to grow, develop and live in communities across the nation.

TASH is an international membership organization of people with disabilities, their family members, other

---

1. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court in accordance with Supreme Court Rule 37.3(a). No counsel for either party has authored this brief, in whole or in part, and no person or entity other than *amici curiae*, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

advocates and people who work in the disability field. TASH has chapters throughout the United States and members from thirty-eight countries worldwide.

Amici have a common interest in this case: concern over the limited number of attorneys available to represent children with disabilities in IDEA proceedings, and whether the rights of parents to represent their own IDEA interests *pro se* are being abridged.

SUMMARY OF ARGUMENT

Lack of access to counsel should not prevent access to the courts. In IDEA, Congress created rights for both children with disabilities and their parents, because the children are uniquely reliant upon their parents to enforce their rights. 20 U.S.C. § 1400-1487. Through IDEA, Congress gave children with disabilities the right to FAPE. Administrative due process proceedings under IDEA give parents the right to challenge school determinations about whether their children are receiving FAPE.

It is the ability of parents to appeal these due process determinations in court which concerns amici writing in support of Petitioner in this case. If parents are unable to appeal to the courts due to a lack of financial or practical access to qualified counsel, then the rights granted through IDEA are empty, and Congress' intent is ignored. Amici have seen first-hand how constituents are hampered in protecting their rights, because of where they live and their inability to find qualified counsel. Now, parents of children with disabilities are being told there is no access to justice if they are unable to find an attorney who they can afford or who will represent their interests *pro bono*.

The Sixth Circuit has ignored the plain language of IDEA and the historical importance given to *pro se* representation. Most egregiously, the Winkelmans are being investigated for unauthorized practice of law, simply because they attempted to pursue those IDEA rights granted to them and their son in court without benefit of legal counsel. This Court has the unique ability to recognize that true access to justice requires much more than having the ability to pay for a lawyer or to find a lawyer who will work *pro bono*.

ARGUMENT

I. Review by This Court Should Be Granted to Protect IDEA and to Resolve the Split Among the Circuits.

IDEA gives parents of children with disabilities the right to file an appeal in any state or federal court against any FAPE decision they believe to be inappropriate. *Honig v. Doe*, 484 U.S. 305, 311-312 (1988). Supreme Court review is therefore necessary in this case to resolve a substantial conflict on two issues: whether parents of children with disabilities can pursue procedural IDEA rights in court *pro se*, and whether parents can pursue substantive IDEA rights *pro se*.

The Sixth Circuit has held that parents can do neither. This decision is in stark contrast to rulings of other Circuit Courts of Appeal. The First Circuit has held, and the Fourth Circuit has assumed, that parents can pursue both procedural and substantive IDEA rights *pro se*. *See Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 250-58 (1st Cir. 2003); *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 383 (4th Cir. 2000). The Second Circuit and a divided Third Circuit have held that *pro se* parents can pursue only

procedural IDEA rights. *See Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3d Cir. 1998).[2] The Eleventh Circuit has stated in dicta that parents can proceed on their own behalf, without elaborating on the procedural versus substantive distinction. *Devine v. Indian Ridge County Sch. Bd.*, 121 F.3d 576, 581-82 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998). The Seventh Circuit initially held the same way, *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147, 1149 (7th Cir. 2001), and appears to have subsequently adopted the First Circuit's approach. *See Mosley v. Chicago Bd. of Educ.*, 434 F.3d 527, 532 (7th Cir. 2006).[3]

Parental involvement is integral to protect individual children's rights, *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 438 U.S. 176, 208 (1982), but as a result of this circuit split, IDEA now applies differently in different parts of the country. At its simplest level, the decision below precludes federal court review of IDEA claims for those parents unable to pay or to find qualified *pro bono* counsel and thus, has an unfairly discriminatory effect. Those who can afford a lawyer or who are otherwise able to retain an attorney remain unimpeded.

---

2. Judge Roth dissented from the panel's decision in *Collinsgru*, arguing that a parent can pursue both sets of rights *pro se*. 161 F.3d at 237.

3. Although the Ninth Circuit has not ruled on this issue, two district courts in that circuit have come to opposite conclusions. *See D.K. v. Huntington Beach School District*, Case No. SACV 05-341-CJC (RNBx) (C.D. Cal. Mar. 22, 2006), which follows *Maroni*; *C.O. v. Portland Pub. Sch.*, 406 F. Supp. 2d 1157, 1169 (D. Or. 2005), which follows *Collinsgru*.

The Sixth Circuit clearly erred in denying the Winkelmans' right to proceed *pro se* in prosecuting their own procedural rights under IDEA. The right to represent one's self in legal proceedings is deeply ingrained in U.S. jurisprudence and pre-dates the Constitution. *Faretta v. California*, 422 U.S. 806, 830 n.37 (1975). A federal statute currently authorizes parents to act *pro se* in federal court. 28 U.S.C. § 1654 (2006). Six other circuits have held or suggested that parents of children with disabilities can appear *pro se* in federal court, at the very least to protect procedural rights, because IDEA "clearly grants parents specific procedural rights, which they may enforce in administrative proceedings, as well as in federal court." *Collinsgru*, 161 F.3d at 233.[4]

The Sixth Circuit also erred in denying the Winkelmans the right to pursue substantive IDEA rights *pro se*. As this Court has recognized, IDEA's procedural protections are based on "the legislative conviction that adequate compliance with the procedures presented would in most cases assure much, if not all of what Congress wished in the way of substantive content." *Rowley*, 458 U.S. at 206. This artificial distinction between procedural versus substantive rights is thus inimical to the meaning and purpose of IDEA. Congress placed as much emphasis on compliance with procedures giving parents a large measure of participation, as it did on measuring the resulting Individualized Education Program

---

4. Unfortunately for the Winkelmans, the court below ruled against them without analysis, citing to a prior decision, *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), *reh'g denied*, 2005 U.S. App. LEXIS 12384 (6th Cir. June 15, 2005). However, the *Cavanaugh* decision holds only that parents may not represent their children *pro se*. *Id.* at 756.

("IEP") against a substantive standard. *Id.*; *Schaffer v. Weast*, 126 S. Ct. 528, 535 (2005).

IDEA is a remedial statute, which should be liberally construed. 20 U.S.C. § 1400(c), (d); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). It protects substantive rights through procedural protections: "IDEA's procedural guarantees serve not only to guarantee the substantive rights accorded by the Act; the procedural rights, in and of themselves, form the substance of IDEA. Congress addressed the problem of how to guarantee substantive rights to a diverse group by relying on a process-based solution." *Maroni,* 346 F.3d at 255, citing *Heldman v. Sobol*, 962 F.2d 148, 155 (2d Cir. 1992).

Substantively, IDEA creates rights between parents and their children that "are overlapping and inseparable." *Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting). IDEA explicitly guarantees FAPE to children with disabilities, and parents are given enforcement rights to ensure their children receive FAPE. 20 U.S.C. §§ 1400(d), 1415; National Council on Disability, *Back to School on Civil Rights* (Jan. 25, 2000), *http://www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm*>. Even when pursuing their own rights they are acting for their children, because parents are responsible for their children's education. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). IDEA's procedural and substantive rights are, therefore, "inextricably intertwined." *Maroni,* 346 F.3d at 255.

By holding that the express language of IDEA views these rights as "joint rights," the First Circuit has given proper effect to Congress' intent. *Id.* at 249. If parents can pursue IDEA's procedural rights *pro se* – and they plainly can – they should also be allowed to pursue *pro se* those IDEA

substantive rights which the procedural rights seek to protect. Parents who appeal decisions affecting their children's rights to FAPE (procedural violations), and parents who challenge the content of FAPE decisions (substantive violations), are "parties aggrieved" within the meaning of the statute and are empowered by IDEA to appear *pro se*. *Id.* at 250.

II. This Court Should Also Grant Certiorari Because the Present Circuit Split Disproportionately Affects Poor Families.

Many mothers and fathers of children with disabilities are forced to proceed *pro se* because they either have no money or have run out of money to pay for a lawyer. *See, e.g., Devine,* 121 F.3d at 578 n.5. Even the most affluent parents may have difficulty in retaining counsel because of the paucity of attorneys knowledgeable in litigating IDEA claims. *See* M. Brendhan Flynn, *In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881, 892 (2005). Often, parents are unable to find a lawyer with both the expertise and the willingness to work for free.

A. Disabled Children Are Over-Represented among Poor Populations in the United States.

Today, almost seven million school-aged children with disabilities have the right to FAPE under IDEA. *Schaffer,* 126 S. Ct. at 531. However, no child who challenges a hearing officer's determination of the appropriateness of an IEP, contests the denial of an IEP, or defends against a school district's appeal to change the terms of an IEP, is permitted to make any decisions in court. Proceedings must be brought on the child's behalf by a representative, next friend or guardian *ad litem*. Fed. R. Civ. P. 17(c).

This Court has stated that parents "will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled" under IDEA. *Rowley*, 458 U.S. at 209. Some children with disabilities are fortunate enough to have parents who, as licensed attorneys, can plead their case in federal court. *See Devine*, 121 F.3d at 581 n.18. For the great majority of children with disabilities, however, "[a]rdor in the face of large attorneys' bills is naturally tempered." Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU Educ. & L. J. 519, 547 (2003).

Special education disabilities have long been linked to poverty and minority status. *See* Mary Wagner *et al.*, *The Children We Serve: Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* (Sept. 2002) <http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf>. There is a higher percentage of lower income families with children with disabilities than among families in the general population, even though in both cases, parents are equally likely to be employed. *Id.* at 12, 28-29, 32, 40. There is also disproportionate representation of some minorities in special education among elementary and middle school students. *Id.* at 12. Well over one third (39%) of students with disabilities, including Jacob Winkelman, live in households where another family member is also disabled. *Id.* at 19.

Equally striking are the statistics showing that although 70% of the almost seven million students with disabilities live in households with two parents, over two thirds (67.8%) of them, or more than 4.5 million children, belong to families living on an income of less than $50,000 a year. *Id.* at 28-29.

For about two million (35%) of these students, the annual family income is less than $25,000. *Id.*

Households with incomes just above the eligibility line for publicly-funded legal services are particularly disadvantaged. American Bar Association, *Agenda For Access: The American People and Civil Justice,* 5 (1996). Legal Services Corporation, for example, requires a family of four living in the contiguous forty-eight states to have an annual income of $20,750 or less to qualify for assistance. *Income Level for Individuals Eligible for Assistance*, 71 Fed. Reg. 5,012 (2006). As a result, less than a quarter of the overall population of children with disabilities (23.6%) in the United States are officially considered to be "living in poverty." *The Children We Serve,* at 29. The remaining families of children with disabilities in this country who live on less than $50,000 a year (or approximately three million children), probably do not qualify for subsidized legal assistance, "and yet seldom are able to afford help from the private bar." *Agenda For Access* at 5.

B. Parents Who Proceed *Pro Se* Are Often Unable to Find Lawyers.

The right to self representation was first recognized at a time when geographic disparity meant litigants could not necessarily obtain the services of a lawyer. *Martinez v. Court of Appeal,* 528 U.S. 152, 156-57 (2000). The highly specialized nature of IDEA cases has resulted in the scarcity of qualified legal counsel. *Collinsgru,* 161 F.3d at 236. The First Circuit decision in *Maroni,* for example, contains extensive discussion on the inability of various state Protection and Advocacy (P&A) agencies to provide full

representation in all but a few cases. *Maroni*, 346 F.3d at 258 n.9.[5]

Recent data from the P&A discussed in *Maroni* indicates the situation has not improved. The Disability Law Center in New Hampshire reports that between October 1, 2004 and September 30, 2005, it was only able to provide legal representation for twenty parents out of a total of 494 special education matters. Similarly, for the 2005 fiscal year, the Arizona Disability Law Center received a total of 1,627 requests for assistance but was only able to provide help in 225 of those cases. Of the 852 cases received in Alaska since 2003, only 9% were handled by an attorney.[6]

Comparable statistics exist in the Sixth Circuit. Between October 1, 1999 and January 31, 2006, the Michigan Protective and Advocacy Services (MPAS) reports that it received 10,399 requests on special education issues but was only able to provide direct representation in 17% of those cases. In Ohio, where the Winkelmans live, the lack of resources at the Ohio Legal Rights Services (OLRS) means that of the 683 requests it received from October 2004 to September 2005, it was able to provide representation in fifty-eight, or less than 10%, of those cases. OLRS also reports that during the past eight months, out of the eighty-

5. The P&A System is a congressionally mandated network of disability rights agencies located throughout the United States that have the authority to provide legal representation to individuals with disabilities, based on a priority system for services. *See* National Disability Rights Network (visited March 30, 2006) *http://www.NAPAS.org/aboutus/PA_CAP.htm*.

6. Affidavits for P&A data reported above are on file with counsel of record.

three requests for due process hearings, parents represented themselves and their children *pro se* in fifty-eight (approximately 70%) of those proceedings because they could not afford representation, could not qualify for representation or could not find *pro bono* or other free representation.[7]

There is a nationwide shortage of attorneys in private or not-for-profit practices who are experienced in IDEA cases, as evidenced by the miniscule numbers of counsel either identified on referral lists or actually representing children with disabilities and their parents in administrative hearings. *See, e.g.*, Melanie Archer, *Access and Equity in Due Process, Attorney Representation and Hearing Outcomes in Illinois, 1997-2002* (Dec. 2002) <http://www.dueprocessillinois.org/AccessDP.htm>; *Maroni,* 346 F.3d at 258 n.9. In the Sixth Circuit, MPAS reports that it lists only two private attorneys on its referral list and for eighty-two out of its eighty-three counties in Michigan, including the ten most populous cities, no private attorneys are listed. Similarly, COPAA lists only seven attorney members in Ohio, ten in Michigan, eight in Tennessee and none in Kentucky. None of the six attorneys listed by Kentucky P&A are willing to accept cases in Western Kentucky.

If legal representation is not available and the parents are not allowed to act *pro se,* then irrespective of valid grounds for appeal, the rights granted by IDEA become worthless. Although the parent can transfer rights at the child's majority under IDEA, these rights lose substantially all of their value if not pursued promptly, since it is not money but a change in present educational circumstances that is

7. Kentucky P&A and the Disability Law and Advocacy Center of Tennessee report similar statistics.

being pursued. *Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting).

C. Whether Parents May Represent Themselves and Their Children with Disabilities *Pro Se* Should Not Depend on the Family's Address.

Pro se parents acting on behalf of their children with disabilities may not be legally trained advocates, but it is better for the children than having no advocate at all. *Maroni*, 346 F.3d at 258. The geographic imbalance that currently exists due to the current circuit split is more than simply the injustice of Jacob Winkelman not being represented by his parents *pro se* because they live in the Sixth Circuit rather than the First Circuit. As IDEA gives jurisdiction to both state and federal courts, if Jacob lived in a state other than Ohio, his parents could possibly sue in state court *pro se* as his next friend.[8] Unfortunately, the local school authority could then remove the case to federal court and secure a dismissal, simply because in some circuits, parents must retain an attorney to represent their children with disabilities. *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 695-97 (2003) (removal is permissible where jurisdiction expressly lies in both federal and state court, even if it interferes with the plaintiff's choice of forum).

Congress could not have intended children with disabilities and their parents to be barred from proceeding when a school's legal counsel makes certain strategic choices of forum. Financial status or the ability to find qualified counsel should not be deciding factors in the right of appeal.

---

8. As discussed in *Maroni*, New Hampshire has such a law. 346 F.3d at 258 n.11.

As the First Circuit explained, "such an outcome subverts Congress's original intent [in the precursor statute to IDEA] . . . that due process procedures, including the right to litigation if that became necessary, be available to all parents." *Maroni*, 346 F.3d at 258, citing *Handicapped Children's Protection Act of 1986*, S. Rep. No. 99-112, at 2 (1986).

D. The Court Should Grant Certiorari to Clarify that Parents Are Not Engaged in Unauthorized Practice of Law.

There are over a quarter of a million children with disabilities living in Ohio who are subject to IDEA. *See* Individuals with Disabilities Education Act (IDEA) Data (visited March 30, 2006) <https://www.ideadata.org/tables28th/ar_1-1.htm>.[9] A frightening prospect for Ohio families is that parental ardor to ensure a child with disabilities receives FAPE could also result in punishment by the State. The Cleveland Bar Association has recently initiated an investigation as to whether the Winkelmans' *pro se* representation of their son's IDEA claims in the lower court constituted the unauthorized practice of law. *See Petitioner's Supplemental Brief*, 1 (March 30, 2006.)

This investigation against the Winkelmans is not well founded in law or reason. As the Delaware Supreme Court's discussion in *In re Arons*, 756 A.2d 867, 874 (Del. 2000) suggests, any prosecution of the Winkelmans for the unauthorized practice of law would not be in keeping with

---

9. Table 1-1 of this data shows the number of children subject to IDEA by state and age group. The total of all age groups in Ohio in 2004 was 260,710.

the established reasoning for the State's interest in policing such matters, which is to protect the public from unscrupulous non-lawyer representation. In sharp contrast, IDEA actively promotes the parent as the child's advocate. *Rowley*, 458 U.S. at 208.

It is unfathomable that the Winkelmans may be prosecuted when there is such a divergence of opinion among the circuits. The potential for such actions serves as a significant deterrent to *pro se* parents seeking enforcement of their children's IDEA rights in court. It also drastically underscores both the importance of the issue presented and the need for this Court to grant certiorari and resolve the circuit split on this issue.

CONCLUSION

For the reasons set forth above and in Petitioners' brief, this Court should grant the Petition for a Writ of Certiorari requested in this case.

Respectfully submitted,

LYNN S. PREECE
Counsel of Record
ERIN E. DOLLY
KELLY GOING
CHRISTOPHER J. KELLER
ERIN MCCLOSKEY MAUS
MARY M. RYAN
ANGELA C. VIGIL
BAKER & MCKENZIE LLP
130 E. Randolph Drive
Suite 3500
Chicago, IL 60601
(312) 816-8022

Counsel for Amici Curiae

DEC 15 2006
OFFICE OF THE CLERK

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL., PETITIONERS

v.

PARMA CITY SCHOOL DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

JEAN-CLAUDE ANDRÉ
IVEY, SMITH & RAMIREZ
2602 Cardiff Avenue
Los Angeles, CA 90034
(310) 558-0932
telephone/facsimile

Counsel of Record for Petitioners

CHRISTINA HENAGEN PEER
SQUIRE SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44144
(216) 479-8500 telephone
(216) 479-8780 facsimile

Counsel of Record for Respondent

PETITION FOR A WRIT OF CERTIORARI FILED: FEBRUARY 2, 2006
CERTIORARI GRANTED: OCTOBER 27, 2006

TABLE OF CONTENTS*

Docket entries, United States District Court for the Northern District of Ohio 1
Docket entries, United States Court of Appeals for the Sixth Circuit 9
Complaint, United States District Court for the Northern District of Ohio, filed July 14, 2004 11
State of Ohio, Department of Education, Impartial Hearing Officer's February 19, 2004, decision (Exhibit B to plaintiffs' complaint, filed July 14, 2004) 21
State of Ohio, Department of Education, State Level Review Officer's June 2, 2004, decision (Exhibit C to plaintiffs' complaint, filed July 14, 2004) 114
Order, United States Supreme Court, filed December 2, 2005 159

* Any spelling, punctuation, or grammatical errors found in the following Joint Appendix pages were intentionally left to show accurately how the original documents appeared.

The following documents were reproduced as appendices to the petition for a writ of certiorari or to the brief in opposition and are not reproduced in this Joint Appendix. They can be found at the following pages:

Memorandum of opinion, United States District Court for the Northern District of Ohio, filed June 2, 2005 ..... Pet. App. 3a-23a

Appellee's motion to dismiss, United States Court of Appeals for the Sixth Circuit, filed July 14, 2005 ..... BIO App. 18b-32b

Plaintiffs-appellants memorandum in opposition to defendants-appellee motion to dismiss, United States Court of Appeals for the Sixth Circuit, filed July 21, 2005 ..... BIO App. 33b-70b

Appellee's reply to appellants' memorandum in opposition to motion to dismiss, United States Court of Appeals for the Sixth Circuit, filed July 28, 2005 ..... BIO App. 71b-75b

Order, United States Court of Appeals for the Sixth Circuit, filed November 4, 2005 ..... Pet. App. 1a-2a

U.S. District Court
Northern District of Ohio (Cleveland)
CIVIL DOCKET FOR CASE #: 1:04-cv-01329-JG

Winkelman et al. v. Parma City School District

Date Filed	#	Docket Text
07/15/2004	1	Complaint against Parma City School District (1 summons and Magistrate Consent Forms issued). Filed by Jacob Winkelman, Jeff Winkelman & Sandee Winkelman. Filing fee paid; receipt number 662252. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Civil Cover Sheet) (C, BA) (Entered: 07/16/2004)
		* * *
08/6/2004	4	Answer to Complaint (Related Doc # 1) filed by Parma City School District. (Peer, Christina) (Entered: 08/06/2004)
		* * *
08/23/2004	7	Motion for temporary restraining order filed by all plaintiffs. (Attachments: # 1 Affidavit of Debra Mandell) (Exhibits on file in clerk's office) (S, R) (Entered: 08/24/2004)
08/24/2004	6	Notice *of Motion in Opposition to Plaintiffs' Motion for Temporary Restraining Order* filed by Parma City School District. (Attachments: # 1 Memo in Support # 2 Exhibit A # 3 Exhibit B #

4 Exhibit C # 5 Exhibit D # 6 Exhibit E # 7 # 8 Exhibit G # 9 Exhibit H # 10 Exhibit I # 11 Exhibit J # 12 Exhibit K # 13 Exhibit L # 14 Exhibit M # 15 Exhibit N # 16 Exhibit O # 17 Exhibit P # 18 Exhibit Q # 19 Exhibit R # 20 Exhibit S) (Peer, Christina) (Entered: 08/24/2004)

08/24/2004 8 Order denying plaintiffs' Motion for Temporary Restraining Order (Related Doc # 7). Signed by Judge Ann Aldrich on 8-24-04. (K, V) (Entered: 08/24/2004)

* * *

09/13/2004 11 Motion for reconsideration of Denial of Temporary Restraining Order and/or motion for relief from order denying temporary restraining order filed by all plaintiffs. Related document(s) 8. (Attachments: # 1 Exhibits (complete document on file in the Clerk's Office, 111 pages)) (C, B) Modified on 9/20/2004 (H, D). (Entered: 09/14/2004)

09/17/2004 12 Memorandum in Opposition to plaintiffs' Motion to reconsider *Issuing a Temporary Restraining Order and/or Motion for Relief from Order Denying Temporary Restraining Order* filed by Parma City School District. Related document(s) 11. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11) (Peer, Christina) Modified text on 9/22/2004

(H, D). (Entered: 09/17/2004)

* * *

09/20/2004 15 Motion to Strike Affidavits, and to Impose Sactions on Attorney Peer filed by all plaintiffs. Related document(s) 12. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E # 6 Exhibit F # 7 Exhibit G) (C, B) (Entered: 09/20/2004)

09/22/2004 16 NOTICE OF INTERLOCUTORY APPEAL to the 6th Circuit Court of Appeals from the 8 Order of 8/24/04, filed by plaintiffs J.W., Jeff Winkelman and Sandee Winkelman. Filing fee of $255.00 received, receipt number 664293. (H, S P) (Entered: 09/23/2004)

09/24/2004 17 Opposition to Motion for sanctions Motion to strike: *Defendant's Memorandum in Opposition to Plaintiffs' Motion to Strike Affidavits and Impose Sanctions*. filed by Parma City School District. Related document(s) 15. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C) (Cossler, Christina) (Entered: 09/24/2004)

* * *

09/29/2004 19 Motion to dismiss *Plaintiff's Complaint* filed by Parma City School District. (Attachments: # 1 Memorandum in Support # 2 Exhibit 1 # 3 Exhibit 2 # 4 Exhibit 3 # 5 Exhibit 4 # 6 Exhibit 5 # 7

Exhibit 6 # 8 Exhibit 7 # 9 Exhibit 8 # 10 Exhibit 9 # 11 Exhibit 10 # 12 Exhibit 11 # 13 Exhibit 12) (Cossler, Christine) (Entered: 09/29/2004)

* * *

10/8/2004 22 Administrative Record of Proceedings (complete document on file in the Clerk's office, approximately 2,000 pages) filed by the Office of the Superintendent of Public instruction. (C, B) Modified text and added revised version (*with notation complete document on file in the Clerk's Office*) of document on 10/12/2004 (C, B). Modified text 10/13/2004 (C, K A). (Entered: 10/12/2004)

* * *

11/08/2004 24 Motion for a stay pending appeal/Motion for an injunction pending appeal filed by all plaintiffs. (Attachments: # 1 Exhibits) (C, B) Modified text on 11/8/2004 (C, B). (Entered: 11/08/2004)

* * *

11/10/2004 26 Motion to hold defendant's motion to dismiss in abeyance filed by all plaintiffs. Related document(s) 19. (C, B) (Entered: 11/10/2004)

* * *

11/22/2004 28 Memorandum in Opposition to Plaintiffs' Motion for Injunction Pending Appeal,

filed by Parma City School District. Related document(s) 24. (Attachments: # 1 Exhibit 1; # 2 Exhibit 2; # 3 Exhibit 3; # 4 Exhibit 4; # 5 Exhibit 5; # 6 Exhibit 6; # 7 Exhibit 7; # 8 Exhibit 8; # 9 Exhibit 9; # 10 Exhibit 10; # 11 Exhibit 11; # 12 Exhibit 12; # 13 Exhibit 13; # 14 Exhibit 14; # 15 Exhibit 15; # 16 Exhibit 16; # 17 Exhibit 17; # 18 Exhibit 18; # 19 Exhibit 19; # 20 Exhibit 20; # 21 Exhibit 21; # 22 Exhibit A; # 23 Exhibit B; # 24 Exhibit C; # 25 Exhibit D; # 26 Exhibit E; # 27 Exhibit F; # 28 Exhibit G) (Cossler, Christine). Modified text on 1/14/2005 (H, S P). (Entered: 11/22/2004)

* * *

12/30/2005 32 Order denying plaintiffs' Motion for Stay Pending Appeal and for an Injunction Pending Appeal (Related Doc # 24), Signed by Judge John M. Manos on 12/30/2004. (F, Siegmund) Modified on 1/25/2005 (H, D). (Entered: 12/30/2004)

01/11/2005 33 Memorandum of Opinion. Signed by Judge John M. Manos on 01/11/2005. (Related documents # 24, 32) (F, Siegmund) Modified on 1/25/2005 (H, D). (Entered: 01/11/2005)

01/14/2005 Order (non-document) mooting Motion by Parma City School District to dismiss (Related Doc # 19). Entered by Judge John M. Manos on 1/14/05. (G, Y.) Modified on 1/25/2005 (H, D). (Entered:

01/14/2005)

* * *

01/19/2005 34 Order denying Motion to strike and for sanctions (Related Doc # 15). Signed by Judge John M. Manos on 01/19/2005. (F, Siegmund) (Entered: 01/19/2005)

03/2/2005 35 Brief in Support of Plaintiffs' Complaint; Motion for summary judgment; and Motion to supplement record filed by all plaintiffs. Related document(s) 1. (Attachments: # 1 Exhibit - final decision of SLRO on remand # 2 Exhibit - Deal case) (C, B) (Entered: 03/03/2005)

* * *

03/17/2005 38 Motion for judgment on the pleadings *Based on the Administrative Record* filed by Parma City School District. Related document(s) 22. (Attachments: # 1 Attachment 1 # 2 Attachment 2 # 3 Attachment 3 # 4 Attachment 4 # 5 Attachment 5 # 6 Attachment 6 # 7 Attachment 7 # 8 Attachment 8 # 9 Attachment 9 # 10 Attachment 10) (Peer, Christina) (Entered: 03/17/2005)

* * *

06/2/2005 39 Memorandum of Opinion: Plaintiffs Jacob Winkelman, Jeff Winkelman, and Sandee Winkelman's Motion for Judgment on the Pleadings Based on the Administrative Record (and request for

reimbursement) is DENIED 35. Parma City School District's Motion for Judgment on the Pleadings is GRANTED 38. Each party to bear its own costs. Signed by Judge John M. Manos on 6/02/2005 (F, Siegmund). Modified text on 6/2/2005 (H, S P). (Entered: 06/02/2005)

06/2/2005 40 Order of Case Dismissal. Jacob Winkelman, Jeff Winkelman, and Sandee Winkelman's Motion for Judgment on the Pleadings Based on the Administrative Record is DENIED. Parma City School District's Motion for Judgment on the Pleadings Based on the Administrative Record is GRANTED. Each party to bear its own costs. Signed by Judge John M. Manos on 6/02/2005. (F, Siegmund) (Entered: 06/02/2005)

07/1/2005 41 NOTICE OF APPEAL to the 6th Circuit Court of Appeals from the 39 Memorandum of Opinion and 40 Order of Case Dismissal of 6/2/05, filed by plaintiffs. Filing fee of $255.00 received, receipt number 671165. (Attachments: # 1 Memorandum of Opinion) (H, S P) (Entered: 07/05/2005)

07/14/2005 42 Acknowledgment from the USCA for Sixth Circuit of receipt of 41 Notice of Appeal (USCA# 05-3886). Date filed in USCA 7/8/05. (H, S P) (Entered: 07/14/2005)

07/25/2005 43 Motion for relief from judgment filed by all plaintiffs. Related document (s) 40. (Attachments: # 1 Sandee Winkelman Affidavit; # 2 Jeff Winkelman Affidavit; # 3 Exhibit A; # 4 Exhibit B; # 5 Exhibit C; # 6 Exhibit - transcript pages from hearing) (C, B). Modified text on 7/28/2005 (H, S P). (Entered: 07/27/2005)

* * *

08/05/2005 45 Opposition to Motion for relief *from Judgment* filed by Parma City School District. Related document(s) 43. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Unreported Case - Cavanaugh) (Peer, Christina) (Entered: 08/05/2005)

08/08/2005 46 Order denying Rule 60(b) Motion for Reconsideration 43. Signed by Judge John M. Manos on 8/08/2005. (F, S) (Entered: 08/08/2005)

General Docket
US Court of Appeals for the Sixth Circuit
#08-3886

Winkelman et al. v. Parma City School District

Date Filed	Docket Text
7/8/05	Civil Case Docketed. Notice filed by Appellant Jacob Winkelman, Appellant Jeff Winkelmann, Appellant Sandee Winkelman. Transcript needed: n □ (jc)
7/8/05	Electronic case filing. District court record can be downloaded electronically. [05-3886] (jc)
	* * *
7/14/05	Appellee MOTION filed to dismiss case. Motion filed by Christine M. Tomko Cossler for Appellee Parma School. Certificate of service date 7/12/05 . [05-3886] (jc)
7/14/05	Appellee MOTION filed to hold briefing in abeyance pending motion to dimiss. [05-3886]. Motion filed by Christine M. Tomko Cossler for Appellee Parma School. Certificate of service date 7/12/05. [05-3886] (jc)
7/21/05	Appellant RESPONSE in opposition filed regarding a motion to dismiss case [3198189-1]; previously filed by Christine M. Tomko Cossler. Response from Sandee Winkelman for Appellant

	Sandee Winkelman, Jeff Winkelmann for Appellant Jeff Winkelmann. Certificate of service date 7/20/05. [05-3886] (jc)
7/28/05	REPLY filed by Christine M. Tomko Cossler for Appellee Parma School regarding appellant's response to appellee's motion to dismiss [05-3886] (jc)
10/21/05	MOTION CAUSE SUBMITTED to panel. [05-3886] (pjm)
11/4/05	ORDER filed: Accordingly, this appeal is dismissed unless within thirty days of the entry of this order an appearance of counsel is entered in this appeal to represent Jacob. [3264263-1] [05-3886]. Damon J. Keith, Circuit Judge, Cornelia G. Kennedy, Circuit Judge, Alice M. Batchelder, Circuit Judge. (jc)

* * *

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

(No. 1:04CV1329)

JACOB WINKELMAN, BY AND THROUGH HIS LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, AS PARENTS AND LEGAL GUARDIANS

– AND –

JEFF WINKELMAN, AND SANDEE WINKELMAN, PLAINTIFFS

v.

PARMA CITY SCHOOL DISTRICT, DEFENDANT

(Filed July 15, 2004)

(JUDGE ALDRICH)
(MAG. JUDGE PERELMAN)

COMPLAINT: APPEAL OF DECISIONS BY STATE EDUCATION AGENCY

Now come Plaintiffs, Jacob Winkelman, a minor, by and through his parents and legal guardians, Jeff and Sandee Winkelman, and Jeff and Sandee Winkelman on their own behalf and offers the following as their complaint:

PARTIES

1. Jacob is an individual, born on May 25, 1997, who has resided in the City of Parma, County of Cuyahoga, and State of Ohio, continuously since at least September 2001, who was to enter kindergarten in the Parma City School District for the 2003-2004 school year.

2. Jacob has been diagnosed with autistic spectrum disorder, requiring the Parma City School District to adhere to the mandates of the Individuals with Disabilities Education Act (hereinafter "IDEA"), *see* 20 U.S.C. §1400. *et seq.*, and is therefore a "qualified individual" under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Americans with Disabilities Act, 42 U.S.C. § 12131.

3. Jeff and Sandee Winkelman are the parents of Jacob and are responsible for his care, custody, and control. The parents have been residents of the City Parma, located in Cuyahoga County, in the State of Ohio, within the Parma City School District continuously since at least September 2001.

4. Defendant Parma City School District (hereinafter "Parma") is the local education agency that is directly responsible for providing a free, appropriate public education (hereinafter "FAPE") to Jacob because of his prior and current residency status.

5. At all times relevant herein, Defendant acted under color of state law.

JURISDICTION AND VENUE

6. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331, 1343 (3) and (4); 42 U.S.C. § 1983; 42 US.C. § 1988; the IDEA, (20 U.S.C. § 1400 *et. seq.*); Chapter 3323 of

the Ohio Revised Code; Section 504 of the Rehabilitation Act of 1973 (42 U.S.C. § 794 *et seq.*); and the Due Process and Equal Protection Clauses of the United States Constitution. Plaintiffs' request for declaratory relief is authorized by 28 U.S.C. § 2201 and 2202.

7. Additionally, this court has pendant jurisdiction to adjudicate any state claims which arise out of the same facts as the federal claims asserted herein.

8. Venue is proper in the United States District Court of the Eastern Division of the Northern District of Ohio, as authorized by 28 U.S.C. § 1391 and 1392.

FACTUAL AND PROCEDURAL BACKGROUND

9. During the 2001-2002 and 2002-2003 regular school years and extended school years, Jacob attended pre-school through the services provided by and through Parma at the Achievement Centers for Children pursuant to an Individualized Educational Program (hereinafter "IEP") developed by Parma pursuant to the mandates of the IDEA. Programming at the Achievement Centers included Special Education Intervention, Physical Therapy, Occupational Therapy, Speech Therapy, and Music Therapy pursuant to specific goals and objectives set forth in the 2002/2003 IEP.

10. On or about May 6, 2003, Parma completed a multifactored reevaluation (hereinafter "MFE"), found deficits in all areas of development associated with autistic spectrum disorder and stated "Jacob is diagnosed with Autism." Accordingly, the MFE determined very specific educational programming needs in the areas of speech language therapy and occupational therapy and recommended educational programming that is specifically designed for children with autism including services that

only licensed speech therapists and licensed occupational therapists can provide.

11. On or about June 2, 2003, Jacob's parents and Parma met to establish an IEP for Jacob for the 2003-2004 school year, as required by the IDEA. Parma unilaterally pre-prepared an IEP and presented it to Jeff and Sandee Winkelman as a take-it-or-leave-it option. An addendum to said IEP acknowledged a need for occupational therapy to address a continuation of very specific goals and objectives. However, said IEP failed to provide goals and objectives for occupational therapy and failed to provide occupational therapy as a service. Additionally, said IEP failed to provide physical therapy, music therapy. The only services provided in said IEP were placement in a special education classroom and only 60 minutes of speech and language therapy per week. Said IEP greatly reduced methods and frequency of services, and therefore, was wholly inadequate to meet Jacob's educational needs as mandated by the IDEA. The IEP appeared to specifically designed to the classroom that Parma had available and wanted to place Jacob in rather than being specifically designed to meet Jacob's special education needs.

12. On June 5, 2003, Jeff and Sandee Winkelman initiated an administrative proceeding by filing a formal request for an Impartial Due Process Hearing as provided in the IDEA. Said complaint alleged that the proposed IEP dated June 2, 2003, did not meat the standards set forth by the IDEA in providing Jacob with a "free, appropriate, public education." (Complaint for impartial due process hearing is attached hereto and marked as exhibit "A") The State of Ohio appointed an impartial hearing officer (hereinafter "IHO") to preside over the administrative proceedings pursuant to the provision of O.A.C. § 3301-51-08 (D).

13. Because of the failure to Parma to follow the mandates of the IDEA and develop an IEP that would provide educational benefit to Jacob, Jeff and Sandee Winkelman, gave notice on or about August 12, 2003, to place Jacob at the Monarch School of Bellefaire JCB ("Monarch School") for the 2003-2004 school year, which specializes in the education of individuals with autistic spectrum disorders.

14. Jacob was placed at the Monarch School on August 26, 2003, where he continued to attend throughout the 2003/2004 school year. Jacob's home program also continued (though the present date) to supplement and work in concert with the Monarch School programming. Currently, Jacob is not attending any school for extended school year because his parents lack the financial resources to provide the necessary educational services, and Parma has not offered an IEP that meets the standards mandated in the IDEA.

15. The evidentiary stage of the impartial due process proceeding commenced on October 16, 2003, and concluded on November 6, 2003, wherein Jeff and Sandee Winkelman and Parma presented evidence in support of their respective cases. The IHO employed an "assistant" over the objections of both parties who took notes, performed research and generally participated in the proceedings.

16. On February 25, 2004, the Impartial Hearing Officer (hereinafter "IHO") issued a decision (attached hereto and marked as exhibit "B"), wherein she found:

> The parents have failed to establish by a reponderance of the evidence that the IEP recommended for the 2003-2004 school year did not provide a FAPE to the child. The individualized education program offered

> takes into consideration the results of the school-age multifactored evaluation and other evaluations, appropriately identifies the child's needs, establishes annual goals and short-term objectives which are intended to address the child's educational deficits, and establishes the appropriate least restrictive environment for the provision of special education and related services. The educational program offered is reasonable calculated to provide educational benefit to the child.
>
> As a result of the determination that the IEP recommended for the 2003-2004 school year offers an appropriate educational program and placement to the child, the petitioners are not entitled to reimbursement for tuition and transportation costs in association with their private placement of the child at the Monarch School for the 2003-2004 school year. (IHO decision at page 32).

17. By and through counsel, Jeff and Sandee Winkelman timely appealed the decision of the IHO, and the Ohio Department of Education appointed a State Level Review Officer (hereinafter "SLRO").

18. On or about June 3, 2004, the SLRO rendered a decision (attached hereto and marked as exhibit "C"), wherein the SLRO stated she had reviewed the entire record of the proceedings and had reviewed, *de novo*, the IHO's applications of the law, and based upon that review, found no errors in the decision of the IHO and affirmed the IHO's decision.

19. Therefore, Jacob Winkelman and Jeff and Sandee Winkelman hereby appeal the decision of the SLRO to this Honorable Court.

APPEAL OF DECISIONS BY STATE EDUCATION AGENCY

20. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 19 of Plaintiff's Complaint as if fully rewritten herein.

21. Parma failed to follow the procedures set forth in the IDEA as to the sequence of decisions and mandated parent participation in the development of the 2003-2004 IEP by deciding the placement and tailoring the IEP to suite that placement and by making such decisions without meaningful input by Jacob's parents. These procedural violations directly resulted in Jacob being denied a FAPE.

22. Parma failed to provide a FAPE to Jacob Winkelman by failing to provide necessary annual goals and short-term objectives and the services necessary to implement said annual goals and short-term objectives in an IEP for the 2003-2004 school year and extended school year as mandated by the provisions of the IDEA. As a result, Jeff and Sandee Winkelman were forced to provide Jacob with private education at their own expense and transport him to another city at their own expense, which has caused great financial, emotional, and physical hardship on the entire Winkelman family.

23. The IHO failed to follow the procedures set forth in the IDEA and O.A.C. § 3301-51-08 (D), (E), and (F) by allowing another person chosen solely by the IHO to co-preside over the proceedings thereby violating Plaintiffs right to due process of law, and by allowing the proceedings to go 217 days beyond the 45 day time limit mandated by O.A.C. §

3301-1-08 (G) (1) (a). It took the IHO 107 days after the conclusion of the evidentiary hearing to issue a decision. Such delay has caused Jacob's parents to use up all of their resources for providing Jacob with an appropriate education a the Monarch School, which has resulted in Jacob not having any services for extended school year services for 2004 and not having any services for the 2004-2005 school year. Had the IHO followed the time limits set forth in the Ohio Administrative Code, this dispute would have been resolved in time for Jacob to be provided a FAPE for extended school year for 2004 and for the 2004-2005 school year.

24. The IHO abused her discretion by disregarding expert medical testimony offered by Dr. Morris Levinsohn on the basis of lack of contact with Jacob while relying upon lay opinion testimony of Parma's employees who had less contact with Jacob. Further, the IHO abused her discretion by giving more weight to Parma's employee's testimony than the testimony of experts who had provided Jacob with special educational services during the 2001-2002 and 2002-2003 school years; testimony which was consistent with the testimony of Dr. Morris Levansohn regarding the educational needs of Jacob.

25. The IHO made factual determinations against the manifest weight of the evidence.

26. The IHO misapplied the law by not requiring Parma to demonstrate that Jacob needed such a drastically reduced amount of services and different educational methods pursuant to Parma's 2003-2004 IEP from what Parma had previously determined to be necessary and provided for Jacob during the 2001-2002 and 2002-2003 school years; services and methods which were demonstrated by unchallenged evidence to be successful.

27. The IHO correctly determined that occupational therapy is a necessary service for Jacob to be able to benefit from education, but misapplied the law by finding the complete absence of goals, objectives and services for occupational therapy on the 2003-2004 "to be no more than a technical violation" which did not amount to a denial of FAPE.

28. The SLRO properly determined that she must conduct a *de novo* examination of the evidence form the impartial due process hearing while giving deference to the IHO for credibility judgments and hearing procedures that are not demonstrated to be an abuse of discretion, and that she must conduct a *de novo* review of the IHO's interpretation and application of the law. However, the SLRO appears to merely provide a "rubber stamp" for the IHO and affirmed the IHO's procedural errors, misinterpretations of the facts and law, and misapplications of the law.

RELIEF

WHEREFORE, Plaintiffs request that this Court enter an Order requiring that the administrative record, i.e., the pleadings, exhibits, transcripts, all orders issued by both the IHO and the SLRO, be filed with the Court, and that, upon review of the administrative record, find that the decisions of the IHO and the SLRO were not in accordance with the mandates of the IDEA and should be reversed, that plaintiffs be awarded reimbursement of all education related services and placements provided since August 26, 2003, including transportation costs at IRS rate, and that the parents, as prevailing parties, be awarded their court costs, witness fees, expenditures and reasonable attorney's fees, pursuant to 20 U.S.C.§ 1415.

Respectfully submitted,

/s/ JEFF WINKELMAN
JEFF WINKELMAN
Appearing pro se

/s/ SANDEE WINKELMAN
SANDEE WINKELMAN
Appearing pro se

1853 Jacqueline Dr.
Parma, Ohio 44134

[EXHIBIT A AND CIVIL COVER SHEET OMITTED]

[EXHIBITS B AND C REPRODUCED SEPARATELY BELOW]

STATE OF OHIO
DEPARTMENT OF EDUCATION

Case No. 1328-2003

IN THE MATTER OF:
IMPARTIAL DUE PROCESS HEARING
ON BEHALF OF JACOB WINKELMAN

MR. JEFF AND SANDEE WINKELMAN
PETITIONERS

-AND-

PARMA CITY SCHOOL DISTRICT BOARD OF EDUCATION
RESPONDENT

JOY M. FREDA
IMPARTIAL HEARING OFFICER

DECISION

PROCEDURAL BACKGROUND

A. Identifying Information

1. Impartial Due Process Hearing on behalf of Jacob Winkelman, who currently resides with his parents at 1853 Jacqueline Drive, Parma, Ohio 44134.

2. Dates of Hearing: October 16, 17, 27, 2003 and
November 6, 2003
Initiated by Parents

3. School District: Parma City School District Board of
Education
6726 Ridge Road (County: Cuyahoga)
Parma, Ohio 44129
Dr. Judith Hudgins, Special Education
Supervisor

Christina Henagen Peer, Attorney for
School District
Squire, Sanders & Dempsey, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304

4. Parents: Jeff Winkelman and Sandee
Winkelman
1853 Jacqueline Drive
Parma, Ohio 44134

Dr. Donald R. Menefee
Attorney for Parents and Child
22408 Lake Shore Boulevard
Euclid, Ohio 44123

5. Date Written Request for Hearing Received: June 5, 2003
Date Final Decision Submitted: February 20, 2004

6. Impartial Hearing Officer: Joy M. Freda, Attorney
6009 Landerhaven Drive,
Suite C-1
Cleveland, Ohio 4413-4192
(440) 461-3600

7. Statement of Written Issue from Written Request for Hearing:

   Parents requested "an impartial due process hearing in order to challenge the Parma City School district, Cuyahoga County, to provide a free, appropriate, public education for [their] child Jacob Winkelman who has a disability. Parma City Schools do not have a developed autistic program that provides the needed intervention and support for Jacob Winkelman. Parents are in disagreement with the placement currently being offered in the Pleasant Valley Elementary school for kindergarten as a continuum to the pre-school placement at the Achievement Centers. The child is not being permitted to be in his least restrictive environment. The only possible resolution to this matter is to place Jacob in a specialized autistic program.

8. Statement of Written Issues submitted by Petitioners on October 14, 2003:

   a) The child should continue his education at Monarch School – an extension of the Achievement Center. The Achievement Center was a placement for the child that Parma Schools supported and helped fund. Although IDEA contains strong preferential language for mainstreaming, the 7th Circuit Court decided that mainstreaming was not appropriate when the regular classroom provided an unsatisfactory education. *Beth B. v. Van Clay,* 282 F.3d 493 (7th Cir. 2002).

   b) It is well established under IDEA that the school district must provide notice of a change of placement. If the parents wish to contest the change of placement, they may file a due process complaint. The parents in this case believe this is an unauthorized change of placement

of which they do not approve. The parents have filed due process as their right.

c) When a more restrictive program has been shown to be successful, the burden of justifying a new IEP, including placement, shifts to the school district. *Board of Educ. of the County of Kanawha v. Michael M.*, 95 F. Supp. 2d 600 (S.D. W. Va., 2000) The parents believe that the previous IEP, set at the Achievement Center and Monarch School, has been very successful. This success, as well as a previous negative history of Jacob at Parma Schools, establishes that the current placement at Monarch is appropriate and in the best interests of Jacob Winkelman.

9. Respondent's Statement of Issues and Position:

The sole issue to be decided is whether the least restrictive environment for Jacob Winkelman is a special education resource room at Pleasant Valley Elementary School or the Monarch School.

It is the District's position that the least restrictive environment for the child is a special education resource room at Pleasant Valley Elementary School as set forth in the proposed 2003-2004 IEP. The IDEA mandates that students be served in their least restrictive environment. Placement at Pleasant Valley will provide Jacob with the opportunity to be exposed to his typically developing peers and typical school routines. This is far less restrictive than a placement at Monarch School where Jacob will not be exposed to typical peers or to a typical school routine. After making excellent progress in the areas of academics, communication, and social skills at the Achievement Center for Children, Jacob is ready to be educated in a typical elementary school environment where he can benefit from exposure to his typical peers.

Therefore, Jacob's least restrictive environment is the resource room at Pleasant Valley, not a separate facility such as Monarch School.

B. Prehearing Procedures

Petitioners served upon Dr. Kurt Stanic, Superintendent of the Parma City School District, a request for an impartial due process hearing on behalf of their son Jacob. The request was received by the Parma City School District on June 9, 2003 (see attachment to IHO Exhibit 1).

The request for a due process hearing was forwarded to Arron Gregory, Educational Consultant, Office of Exceptional Children, State of Ohio, Department of Education. Thereafter, the parents and the school district were provided with the names and resumes of three potential hearing officers. By mutual agreement, Joy M. Freda was selected to serve as impartial hearing officer (hereinafter IHO) for the due process hearing (IHO Exhibit 1).

After receipt of the written notice of appointment in a letter dated June 18, 2003, the IHO contacted the parties by telephone. Thereafter, on June 20, 2003, letters setting forth the rights and responsibilities of the parties in the due process setting were forwarded by the IHO to the petitioners Jeff and Sandee Winkelman and to Christina Peer of Squire, Sanders & Dempsey, L.L.P., counsel for respondent Parma City School District (IHO Exhibits 2 and 3).

On June 24, 2003, petitioners requested a forty-five (45) day extension of time in order to obtain legal counsel. A thirty (30) day extension of time to August 20, 2003 was granted (IHO Exhibits 5 and 6).

The petitioners retained Dr. Donald R. Menefee to represent their interests in the due process hearing.

Thereafter, the parties and their legal counsel engaged in voluntary mediation. Efforts to mediate the issues presented in the request for due process were not successful.

On or about August 12, 2003, a telephone conference was held, involving Donald Menefee, counsel for the petitioners, Christina Peer, counsel for the school district and the IHO. At this time, the dates for the disclosure conference and due process hearing were finalized; and a scheduling order was issued (IHO Exhibit 8).

At the time of the telephone conference, the appropriate stay put placement of the child during the pendency of the action was discussed. Petitioners sought to have the child placed at Monarch School and argued it was an appropriate extension of the curriculum at the Achievement Center, the child's placement during the 2002-2003 school year and during the 2003 summer (ESY) session, while the school district contended stay put should be at the Pleasant Valley Elementary School in the Parma City School District. The parties were directed to attempt to reach an amicable resolution of the disagreement; if none was achieved, briefs were to be submitted to the IHO not later than August 20, 2003. Briefs were received in a timely manner (IHO Exhibits 11 and 12).

On August 28, 2003, the IHO entered an interim order identifying the child's stay-put placement as the Achievement Center for Children - East operated by the Cuyahoga County Educational Service Center (IHO Exhibit 13).

The disclosure conference was held on September 30, 2003 at the Parma City School District Board of Education offices. Present were Sandee Winkelman, parent of Jacob Winkelman , Dr. Donald R. Menefee, attorney for the parents and child, Dr. Judith Hudgins, Special Education Supervisor

for the Parma City School District, Christina Henagen Peer, of Squire, Sanders & Dempsey, L.L.P., attorney for the school district, and the IHO. The parent indicated she desired a written transcript of the hearing proceedings and a final decision in written format. In addition, a closed hearing was requested, and it was indicated the child would not attend. The parent and school district exchanged witness lists and exhibits (IHO Exhibit 20).

Counsel for the school district waived service of notice by certified mail upon the school district superintendent and individuals included on the district's witness list of the date/time of the hearing and of their anticipated attendance. The parent waived notice by certified mail upon the parents and their witnesses of the date/time of hearing. The parties agreed to cooperate to establish a witness sequence and to advise the IHO of the witness order; it was determined no agenda would be required. The parties discussed the use of telephone conferencing equipment to permit testimony of certain expert witnesses; it was agreed this mode of appearance would be permitted in limited circumstances (IHO Exhibit 20).

C. Post-Hearing Procedures

On the final day of hearing, petitioners sought to introduce the telephonic testimony of Toni Giannone, the consultant who designed the Monarch School program, in rebuttal of testimony given by Dr. Newlin that the school was not an appropriate setting for autistic children. Counsel for the school district objected to the introduction of the testimony, as she recalled Dr. Newlin's statements to be confined to the propriety of the program for the child, based on her knowledge of him and his specific needs, and not as addressing the manner in which the school served the needs of autistic children in general. Inasmuch as it was not possible to access the actual transcript of Dr. Newlin's

testimony, the testimony was introduced, with the proviso that, after the transcripts were received and reviewed by the parties, a motion to strike could be filed and would be ruled on in conjunction with the preparation of the decision in this matter.

On December 1, 2003, a motion to strike was filed by counsel for the school district. The motion alleged the testimony of Dr. Giannone should not be admitted since (1) petitioners misconstrued the testimony of Dr. Newlin and (2) even if the testimony had opened the door, rebuttal testimony must *rebut*, and respondent does not consider that to be the case here. The specific testimony in question is as follows:

> Q. How would you possibly know that since you haven't been involved with that [Jacob's IEP] since 12/20/01?
> A. Because of what I know about what's good programming for children with autism.
> Q. So that's a generalized statement for autistic kids?
> A. Right.
> Q. Not specifically for Jacob, but for autistic kids?
> A. For autistic kids, right. (Tr. 612-13)

Frankly, it is a close question as to both points raised by respondent. Regrettably, the intent of Dr. Newlin is not quite as clear as one would like. Assuming, therefore, that the door was open to rebuttal, the testimony of Ms. Giannone establishes the rationale for the segregated setting utilized at Monarch school. The intent of the testimony was to validate the model for the program and not to dispute the specifics. For the foregoing reasons, the motion to strike is overruled.

FINDINGS OF FACT

Relating to Due Process Procedures:

1. Petitioners were provided a list of three hearing officers and their qualifications from the Ohio Department of Education (Tr. 10).

2. Petitioners received written notice of the time and place of the due process hearing in a language and form understandable to them (Tr. 10).

3. Petitioners received a document listing their rights relating to the hearing in a language and form understandable to them. Petitioners read the document, and no interpretation by others was required (Tr. 10).

4. Petitioners were informed of the potential availability of free or low cost legal and other relevant services in the area (Tr. 11).

5. Petitioners received a copy of the brochure entitled "Whose IDEA is This?" (Tr. 11).

6. Petitioners and their legal representative were granted access to their child's educational records; and no copying fee effectively prevented the parents from exercising their right to inspect and review the records (Tr. 11).

7. Petitioners were aware of all documents to be presented and names of representatives and witnesses who would appear at this hearing at least five days prior to hearing (Tr. 12).

8. Petitioners requested the hearing to be closed and asked for a written transcript and decision (Tr. 12).

9. Respondent cooperated to the extent necessary to assure the petitioners were accorded the pre-hearing due process procedures outlined in items 1 through 8 above (Tr. 11-12).

10. Respondent was aware of all documents to be presented and names of representatives and witnesses who would appear at this hearing at least five days prior to hearing (Tr. 13).

Relating to the Testimony and Exhibits:

11. The child is currently six years old (d.o.b. May 25, 1997). He is the youngest of five children born to his parents (Tr. 16).

12. During his first year, the child was in and out of the hospital. Initially, he appeared to experience some breathing difficulties and was ultimately diagnosed with apnea. He also had frequent choking spells and, based on a modified barium swallow, it was determined he was aspirating roughly 50 per cent of his food intake. The problems were minimal so long as the child was breast fed. However, once he was introduced to solid foods, the child suffered repeated bouts of pneumonia. A battery of tests was performed; and the condition was identified as a tracheal malacia and determined to be primarily neurological in origin. Treatment consisted of occupational therapy to strengthen the muscles of the trachea. It should be noted the school-age evaluation team report indicates the existence of a tracheoesophogeal cleft that was surgically repaired prior to one year of age. (Tr. 16-18, Respondent's Exhibit C, 023).

13. At one year, an endoscopy was performed to determine if a hole or other abnormal condition existed in the

trachea. The results were normal; however, during this timeframe, the occupational therapist at University Hospital indicated to the mother that the child had some "missing developmental milestones", including lack of eye contact and words (Tr. 18-19).

14. At age two, the child was evaluated for occupational therapy and speech. The evaluation found significant signs of autism. As a result, a home program was initiated; and the child received intensive therapies (Tr. 19-20).

15. The child's parents contacted the Parma City School District, their district of residence, to conduct a multifactored evaluation in order to establish eligibility for services under the IDEA and to provide for uninterrupted interventions once the child turned three (Tr. 20)

16. At age 3, the child was enrolled in the Parma City Schools' morning preschool program. (Tr. 20).

17. At the time of enrollment, the child was daytime potty trained and had started to utilize some words and gestures, particularly to address his needs (Tr. 21).

18. Jacob had problems sleeping through the night on a regular basis, and it was frequently difficult to get him up in the morning. Also, once he started school, the child "lost his potty training completely" and began developing severe bowel obstructions (Tr. 21).

19. Jacob's mother contacted Dr. Newlin, then supervisor of the school district's Special Education Department, and requested the child be placed in the afternoon program. He started the afternoon program in February, 2001; but the anticipated improvement in at-

home behaviors did not materialize. However, the school reported the child was "doing fine, . . . mastering, . . . following through with the IEP" (Tr. 22-23).

20. After attending a school play in which the child was scheduled to perform and observing the child "under the table, screaming, red, hands on the ears, and not participating" – a conduct that continued for ten to fifteen minutes until the parent took the child home – the mother scheduled an observation during a regular school day. During the course of observation, she discovered there was an aide in the classroom who described her duties as to assist the child and to insure he did not harm himself or others. Also, the child was not transitioning well from one activity to another; and attempts to force him to transition were met with screaming and recalcitrance (Tr. 24-27).

21. At this time, Jacob was also attending regularly-scheduled private sessions of occupational therapy, speech therapy and behavioral therapy which were paid for by his parents. The parents have continued to provide such therapies to this day (Tr. 29-30,).

22. After discussions with Dr. Newlin and research of alternative programs, it was agreed the child would attend the Achievement Centers, with the costs to be borne by the Parma City Schools. The child began at the Achievement Centers in approximately July, 2001, at the age of four (Tr. 29, 31, 36).

23. The parent depicted the first year of attendance at the Achievement Centers as one in which the school was "basically trying to get [the child] comfortable with going to school, following a routine, learning that he had things that were expected from him and he needed

to do them and being able to stay in the classroom" (Tr. 32)

24. The IEP addendum governing provision of services at the Achievement Center for the 2001-2002 school year was completed on December 21, 2001; needed services identified consisted of 90 minutes of speech language pathology per week (60 minutes individual and 30 minutes small group) and 90 minutes of occupational therapy per week similarly divided. Special education preschool teacher and teacher assistants for 27.5 hours per week were also listed in this column. Least restrictive environment was determined to be a "specialized program for preschool children with intensive communication and social needs at Achievement Centers for Children (East)". At a later date, i.e. on or about May, 2002, music therapy was incorporated as a needed service for 30 minutes a week, with transition to small group. In a subsequent IEP dated October 9, 2002, the music therapy was modified to 15 minutes per week, with an additional 15 minutes per week consultative services (Respondent's Exhibits G, I).

25. During his second year at the Achievement Centers, the child demonstrated developmental progress in several areas. He began to use more words and to express himself in three to four word sentences. When choices were offered, he was frequently able to accept one of the options given rather than "having a behavior". He responded well to the structured nature of the TEACCH methodology and completed assigned tasks regularly. Finally, he was getting kindergarten ready; specifically, the program was focusing on needed prekindergarten skills and the child was responding positively (Tr. 38-40).

26. The "Summary of Progress" covering the period September, 2001 to May 6, 2003, prepared by Jacqueline Gerber, Lead Teacher, Achievement Centers, reflects the child made great strides in the areas of pre-academic and social/play skills. Specifically, when assessed in September, 2002, i.e., at the start of his second year at the Achievement Centers' program, he had mastered 80 percent of the TEACCH preschool curriculum guide – cognitive/readiness skills section, and also demonstrated the ability to retain and generalize skills. With respect to social/play skills, the child was able to follow the lead of an adult and carry out a back and forth engagement of the adult's ideas during play. He also attempted to do this with a peer but required adult supervision and prompting to continue the play (Respondent's Exhibit N, 181-182).

27. Petitioner consented to the IEPs offered by Parma City Schools for the 2001-2002 and 2002-2003 school years. The child's IEPs for the 2001-2002 and 2002-2003 school years specify at "Reason for Placement in Separate Facility" the child's need for "specialized supports for behavior and academics that aren't available in a public school setting." (Tr. 85, Respondent's Ex. I, J).

28. On January 27, 2003, A "School Age Planning Form: Reevaluation" was prepared by Roberta Beeler, school psychologist, Yvette Newlin, Special Education Supervisor, and Jeff Winkelman, Parent. At the same time, the father was provided with the "Written Notice to Parents" form that specified the evaluation was necessary due to the child's transitioning from preschool to school age. The father executed the parental consent form (Tr. 115-116, Respondent's Exhibit C).

29. Roberta Beeler has been a school psychologist in the Parma system since 1991. She holds a bachelor of science degree in elementary education and a master's degree in school psychology, both from Wayne State University. She has approximately 23 years' total experience in the field. Ms. Beeler holds permanent certification as a school psychologist from the state of Ohio and is also nationally certified in her field. Ms. Beeler described the Vineland Adaptive Behavior Scales as a measurement that demonstrate how a child functions in the specified areas listed in comparison to other children of the same chronological age. A review of the child's scores indicates age appropriate motor skills, moderate delays in daily living skills and socialization, and delays in communication skills that were "on the cusp of being . . . significant" (Tr. 117-120).

30. In response to a query regarding the child's readiness for academics, Ms. Beeler stated the information provided by Jacqueline Gerber, the child's lead teacher, in completing the Kindergarten Admission Scale provided a "very strong indication of readiness". In addition, the scale was completed in February 2003, and it is likely the child would have shown further growth had the test been conducted during the summer. Ms. Beeler also noted the mother completed the same document. A comparison of the two scales revealed many areas of similarity. Overall, however, it appeared that the child was demonstrating more skills in the classroom setting than he might have demonstrated at home. Ms. Beeler stated it is not unusual to see variances between how a parent rates a child and how a teacher rates a child (Tr. 121-123. 136).

31. The school-age multifactored evaluation was completed and signed on May 6, 2003. Based on the data gathered

for the multifactored evaluation, the MFE team determined the child continued to have a disability, to-wit: autism; and the disability condition had an adverse effect upon the child's educational performance. The team set forth the following implications for instruction and progress monitoring:

> Consider continuation of the TEACCH methodology for [the child's] academic learning.
>
> [The child] focuses more in a structured area that is organized with limited auditory and visual distractions.
>
> Utilize high motivators (which are constantly changing). Continue positive reinforcement while working.
>
> [The child] enjoys adult interaction and will gather himself during a meltdown if he assumes that he will be left alone with no one to work with him.
>
> Provide a setting that has a consistent schedule as well as reminders or warnings when there is a change to the routine.
>
> [The child] responds well to heavy work and proprioceptive activities throughout the day.
>
> He would benefit from additional opportunities to practice fine-motor skills and visual perceptual tasks needed for school and self-care. (Respondent's Exhibit C, 084).

32. Although the child's progress on goals and objectives set forth in the 2002-2003 IEP were reviewed, no substantive discussion of the child's IEP for the upcoming school year was conducted on May 6, 2003.

An IEP meeting was held on June 2, 2003, at which time a placement in Parma City Schools was offered. The parent described the program as one-half day in a smaller classroom with a special education teacher and one-half day in a regular kindergarten with an aide. Related services identified in the IEP were sixty minutes of speech therapy per week and occupational therapy, with the specific time allocated to be determined after an evaluation of present skills by the occupational therapist. There was no music therapy and no family continuum. On cross-examination, the mother iterated her belief that the IEP provided for one-half day placement with an aide in a regular education kindergarten classroom consisting of 20+ students. When queried again later, the mother acknowledged recollection of a discussion that the child would be placed in a self-contained classroom for six hours at the outset, but then would have opportunities to transition into a regular education kindergarten as appropriate (Tr. 41-42, 77, 91-92).

33. The IEP team consisted of the child's mother, Dr. Judith Hudgins, Director of Special Education for the school district, Jacqueline Gerber, the child's lead teacher at the Achievement Centers, Amy Lumadue, mental health therapist from Beechbrook. Michelle Munici, speech language pathologist with the school district, Julie Peacock, occupational therapist with the school district, and Julie d'Aliberti and Kim Tomco, special education teachers with the school district. The name of the final signator to the IEP is illegible; however, it may have been Scott, the family liaison employed by the Achievement Centers (Respondent's Exhibit K).

33. Jacob's parents and the school district could not reach an agreement as to Jacob's needs. The IEP document,

at the signature page states at the top "06/02/03 Participation Only". The parents prepared an attachment to the IEP approximately 1.5 pages in length addressing their perception of the child's needs and present levels of performance. The document concludes with the following statement: "[the child] needs to continue in a specialized program until he is able to work more independently, make the right choices, increase his intelligible speech, increase his attention to stay on task with activities with less motivation . . . ." The mother testified the Parent Attachment to IEP was prepared as a form of prior written notice to the school district. The parent discussed the information contained in the Parent Attachment during the course of the meeting. At the consent block on the final page of the IEP, the parent signed and dated the form after marking the second block which states "I give consent to initiate special education and related services specified in this IEP except for LRE" (Tr. 43, 68-69, Respondent's Exhibit K).

35. The school district provided a "Written Notice to Parents" form dated June 2, 2003, relating to a proposal to change placement. Under "Description of Action", the form indicates the "parent disagreed with offer of 6-hour classroom in public school setting with self-contained special education instruction for kindergarten. Parent wants specialized autistic program out of district" (Respondent's Exhibit P).

36. The mother declined to observe the classroom setting or the teacher proposed by the school district as part of the appropriate placement for the child. The mother stated she had observed the full-day kindergarten for special education students in 1999 or 2000 in contemplation of the possibility of her older daughter being placed in that

setting and did not consider it necessary to do so again (Tr. 82, 89).

37. The parents requested due process on June 5, 2003. At the conclusion of the IEP meeting on June 2, 2003, the mother concluded it was not possible for all IEP team participants to agree on the appropriate least restrictive environment for the child. The parents believed the child required placement in a specialized autistic program. At the time of the IEP meeting, mother had presented the Parent Attachment to Dr. Hudgins and asked her to indicate she agreed or disagreed with its contents and affix her signature. Dr. Hudgins, Director of Special Education, refused to sign. The parent stated: "I just felt we were never going to agree. We just could not agree. We couldn't agree on how much he needed, what he needed, why he needed it." (Respondent's Exhibit A, IHO Exhibit 1, Tr. 43-44).

38. As early as February, 2003, the parents had expressed interest in investigating alternative placement options for the child for the 2003-2004 school year and had mentioned this fact to Dr. Judith Hudgins. Although the mother denies it, the parent apparently indicated to the child's private speech therapist in March, 2003, that she desired her child continue his education at Monarch School In May, 2003, there was discussion as to the possibility of a startup autistic program in the Parma City School District; however, it was apparently delayed or cancelled due to budgetary concerns and the hiring of a new superintendent. In the interim, the parent was identifying other program options and had contacted Monarch School for literature (Tr. 30, 47, 77, 81).

39. The child was enrolled by the parents at the Monarch School for the 2003-2004 school year. The school

brochure indicates it is designed to provide the highest quality of individualized programming for children with autism spectrum disorder. The ultimate goal of the program is to transition the students back to their home school district (Tr. 48-50, 195, Petitioners' Exhibit 6).

40. Deborah Mandell serves as the director of Monarch School. She has been employed at the facility for three years in an administrative capacity. Prior to her employment at Monarch, she served as director of a child evaluations center at Cooper Hospital in New Jersey for 12 to 14 years. Ms. Mandell holds an undergraduate degree from the University of Pennsylvania in occupational therapy and a master's degree from St. Joseph's University in Pennsylvania. Ms. Mandell is hopeful the child can be transitioned back to his home school as early as next year. (Tr. 192-194, 202).

41. Ms. Mandell stated the Monarch program currently serves 23 autistic children and employs 26 full-time staff members. Tuition is $56,000 per year for daytime instruction, excluding transportation. The child is currently receiving a financial grant renewable in 12-week segments that significantly reduces the family contribution. In addition, the family is required to provide transportation (Tr. 75, 194-196).

42. The admissions process at Monarch does not incorporate formal assessments. In this instance, Ms. Mandell and Dr. Howard Chane, a team member from Boston, Massachusetts, who visits on a weekly basis, met with the child and the family. The determination to admit was based principally on "conversations with the family, their concerns about [the child], his present levels at the time, their goals for him". Ms. Mandell

stated none of the final progress summaries prepared by Achievement Centers was reviewed prior to admission. She could not recall whether she had viewed the school age MFE at that time (Tr. 204-207).

43. Mr. Mandell represented every student enrolled in the school initially receives instruction in a one-on-one environment. The child's day at Monarch consists of the following sessions: (a) 30 minutes of individualized speech therapy; (b) one hour of individualized academics focusing on language arts, social studies and reading, (c) 30 minutes of individualized speech therapy, (d) social recess group, involving six to seven children and three staff members, (e) small lunch group, with one other child, (f) 30 minutes of music therapy, (f) 30 minutes of individualized occupational therapy (three children with three therapists), (g) individualized academic session involving math, and (h) small group academic instruction involving three children total. The child also has gym once a week with a total of four to five children in the class (Tr. 200-201, 204, 226).

44. The structure of the Monarch program provides no opportunities for contact or interaction with typically developing peers (Tr. 208, 222).

45. All children in the Monarch program have a diagnosis on the autism spectrum. Ms. Mandell indicated most of the students were lower functioning than Jacob. There are approximately two or three students currently enrolled who are higher functioning than the child (Tr. 203, 228-229).

46. Ms. Mandell identified the child's needs to include (a) learning how to learn, (b) an intensive language-based program, (c) the intensive structure of a one-on-one

environment, and (d) the opportunity to develop skills so that he can be taught in a larger group and be successful. Ms. Mandell reached these conclusions based on her conversations with the family, her meeting with the child and input from other staff members who met the child (Tr. 198).

47. Ms. Mandell acknowledged the child would have some successes in an instructional setting other than one-on-one – specifically a classroom with five to seven children. "[H]e would learn but would learn less, and I think he would not feel like a successful learner" (Tr. 199).

48. Lillian McNulty is an occupational therapist at University Hospitals; she worked with the child during the period August 1999-February 2003. Occupational therapy sessions focused on sensory motor activities, self-help skills and fine motor play skills. As therapy progressed, the child was able to choose and seek out sensory-based activities on his own. The therapist structured the fine motor play activity to insure the appropriate goals were being addressed; however, the child was given choices, such as "do you want to string beads or do you want to cut with scissors?" (Tr. 100-101).

49. The progress reports/notes provided for the University Hospitals of Cleveland occupational therapy sessions were not complete, and the therapist could not recall if the child had met the goals established. Ms. McNulty described kindergarten readiness as requiring fine motor skills such cutting and writing your name, the identification of colors, shapes, managing fasteners, and beginning to shoe tie. Ms. McNulty was unwilling to specify, based either on her personal experience with the child or information provided in the occupational

therapy final summary from Achievement Centers dated May 6, 2003, whether the child could be considered to possess the appropriate skills for kindergarten. However, she did acknowledge that, based on the Final Progress Summary, it appeared child had progressed during the period between her final session with the child and May, 2003 (Tr. 103-108, Petitioners' Exhibit 10, Respondents' Exhibit N, 190-191).

50. The occupational therapy final summary from Achievement Centers dated May 6, 2003, indicates that, based on the Peabody Developmental Scales, the child is able to create block structures, copy shapes from a model and cut more accurately. The TEACCH checklist demonstrates the child's ability to draw simple shapes and manage fasteners. His current IEP goals address many of these needed skills; he is able to color with greater accuracy. The child is beginning to write the letters of his name on a line and is independent with doing this on a chalkboard. He is also more accurate with cutting simple shapes such as a circle. He is able to manipulate zippers, large buttons and snaps with cueing and is beginning to learn shoe tying (Respondents' Exhibit N, 190-191).

51. Ashley K. MacGuire is employed as a speech therapist at University Hospitals. She holds an undergraduate degree from McGill University in Montreal, Canada, and a master's degree from Case Western Reserve in speech pathology. She was hired at University Hospitals immediately after her graduation in 1999. Ms. MacGuire has worked with the child during the following periods: October 2001 - December 2001, January 2002 - November of 2002, and from May 2003 to the present. Initially his sessions were one hour per

week; however, more recently he has been scheduled on a biweekly basis. (Tr. 168, 171, 175)

52. Ms. MacGuire describes the child's progress in therapy as "good". "He is able to answer questions now. He is able to attend better. He is expressly talking in sentences. There is still a long way to go, but he is definitely making huge progress" (Tr. 175-176, 186).

53. Ms. MacGuire stated the child continues to require speech therapy. He experiences difficulties in the following areas: appropriateness of responses, staying on topic, difficulty in turn taking, difficulty expressing his feelings or narrating a story, difficulty with "why" questions although he is starting to answer them, and problems with pronoun usage. Sometimes he races ahead of himself while speaking and reverts to jargon, which is essentially a speech sound or clarity difficulty. This testimony was consistent with that provided by Mary Beth Koss, manager of the education department at the Achievement Center. Ms. Koss indicated that although the child had made significant gains in the area of language communication, strong elements of challenge remain; and speech therapy is a critical element of the child's education (Tr. 176-178, 379-381).

54. The speech therapy notes reflect increased cooperation from the child beginning in October, 2002. He was better able to attend and follow through on activities. At present, the therapist no longer uses hello or good-bye songs with the child; nor is a picture schedule required to keep the child on task (Tr. 183-184).

55. Amy Lumadue is employed as a mental health therapist at Beech Brook. She received a bachelor's degree from Bethel College in psychology; in addition, she was

awarded a master's degree from St. Mary's University, Minneapolis, Minnesota in 1998. Prior to coming to Beech Brook approximately 2.5 years ago, Ms. Lumadue worked with a psychologist as an autism specialist. Her work experience also includes employment in Minnesota as an in-home therapist in the field of autism. Overall, she has worked with autistic children for 13 years. Ms. Lumadue met Jacob as a client in July, 2001; his parents sought assistance in addressing certain specific behavior issues, including temper tantrums, fighting with his sibling and defiance. Her therapy began individually with Jacob and now involves a small group setting depicted as four children and two instructors. Ms. Lumadue typically sees Jacob once a week. (Tr. 240-243, 251)

56. Since Ms. Lumadue has been involved with Jacob, she has observed progress and growth in all goal areas. His temper tantrums are less frequent and severe; he has better coping skills, is more adept at problem solving and is better able to verbalize his needs. He has improved at social interaction; he is able to socialize and communicate with others, and to maintain interaction with other people in order to follow directions, play and attend. Finally, in the area of self-regulation, his ability to control his body, focus and attend to tasks has improved (Tr. 246-247).

57. Ms. Lumadue characterized the child's involvement in settings with more than one child as "going well"; however, she indicated he tended to lose focus when more people were in the room. Ms. Lumadue acknowledged the importance of broadening the child's opportunities to develop his socialization skills in larger group settings because the implementation of life skills typically occurs in an environment "with a lot of people around you". (Tr. 247-250, 255).

58. The Beech Brook Quarterly Review dated January 15, 2003, indicates, at Page 3, that the child began group therapy and ". . . adjusted quickly to the group format. He was cooperative with activities and interacted with peers, with support from therapist. He has established a reciprocal relationship with one of the other boys in the group, and spontaneously interacts with all peers in the group. He continues to need prompts and visual cues . . . ." However, the most recent review dated July 15, 2003, reflected inconsistent progress; it noted the child continued to engage in aggressive play and to use behavior to manipulate others to get what he wanted (Respondent's Exhibit V, 347, 343).

59. Jaime Alspach is a music therapist who is presently employed at the Music Therapy Enrichment Center; she provided services to the child under contract with the Achievement Centers. She holds a bachelor's degree in music from Ohio University and is board certified at the national level in music therapy. She defines music therapy as the "therapeutic use of music toward nonmusic goals or aims" (Tr. 143-145).

60. Ms. Alspach worked with the child from September, 2001 through July, 2003. Services were provided once per week for 15 minutes of 1:1 instruction and an additional 15 minutes consultative, where staff members hold a weekly team meeting to discuss classroom strategies including group sessions incorporating music therapy such as circle time (Tr. 145-147, 149).

61. Each student at the Achievement Centers receives the same amount of music therapy on an individual and consultative basis; however, it was included on the child's IEP because anecdotal evidence tended to indicate the child responded very well to the structure

of the music setting. It was not necessary to sing to the child for him to understand the instructions given, although Ms. Alspach opined he seemed to grasp instructions given in song format a little better (Tr. 156-157).

62. Ms. Alspach described the child as a good peer model in group settings. She stated he was very verbal and seemed to enjoy what he was supposed to say. The child also encouraged others to speak or play an instrument. He was willing to share and turn take, two skills that other students lacked at times. Ms. Alspach indicated the child benefited from the social interaction with his peers that he received in group time; and learning to do things within a group was an important skill for the child to learn (Tr. 158-159).

63. Ms. Alspach worked with the child on various kindergarten readiness skills. She recalled use of a calendar song and a weather song to identify different weather conditions and days of the week. They also worked on spatial concepts and body part identification. Although unable to find her chart on which she recorded relevant data, Ms. Alspach stated the kindergarten readiness skills went well; with respect to those specific skills she worked on with the child, he had success (Tr. 153-154).

64. Jacqueline Gerber is a preschool teacher in the autism program at the Achievement Centers. She received an undergraduate degree in early childhood education from Ohio University and a master's degree in the same field from George Mason University. She holds an early intervention specialist certification and is completing the requirements for special education certification. Ms. Gerber has been employed at the Achievement Centers for a total of six years, and has

held her current position for the past four years (Tr. 409-410).

65. Staffing at the Achievement Centers consists of a lead teacher, i.e., Ms. Gerber, two assistants, two educational aides, a speech therapist, an occupational therapist and a parent educator. At least four adults – typically the lead teacher, two educational aides and one of the therapists – are in the classroom for the full school day (Tr. 384-385).

66. The class is comprised of a maximum of six children, and its overall organization is very structured. After the child has removed his outerwear and settled in, he follows his picture schedule. The first activity addresses gross motor skills and is completed as a group; examples include jumping, balance beam or an obstacle course. Thereafter, rotations begin. The classroom is divided into discrete areas or stations. Two children go to a TEACCH session accompanied by two adults, and academics are addressed. Two children move to floor time with one adult. Two children visit the sensory fine motor area; in the first rotation, sensory activities typically involve using play dough, silly putty, or similar materials. At the end of 15 minutes, these sessions rotate until each child has completed a full rotation of three stations. At that point, the students are divided into two groups of three; one group has snack and the other participates in circle time. These activities would be followed by a 20-minute outdoor recess, another complete rotation and lunch. The afternoon session would involve one full rotation, circle time, including a good-bye song, and departure (Tr. 415-419).

67. The speech therapist allotted 90 minutes per child per week, and the IEPs of most of the children at the

Achievement Centers reflected a 90-minute per week speech-language therapy requirement. Typically, a speech therapist was at Achievement Centers three days a week for the entire day. The format of speech therapy pullouts was at the discretion of the individual therapist. Options included remaining with a child for a full rotation as he cycled through each activity or actually pulling him out and working with him 1:1 in a segregated environment (Tr. 4 19-420, 468-469).

68. Ms. Gerber described the various methodologies incorporated in the Achievement Centers program including TEACCH and Floor Time, as well as the use of PECS schedule. On cross-examination, Ms. Gerber acknowledged the child did not necessarily require a specific methodology to succeed; rather, he required a structured system that would help him maintain focus (Tr. 432-433).

69. Depending on the day and the activity, the child could be a peer model for others. His strengths rested in the fact he possessed words and the other children benefited from hearing him using words; also he was developing interactive play skills involving toys (Tr. 433-439).

70. The child demonstrated improvement in the area of transitions, particularly after he was placed on medication during the summer of 2002. Generally, he seemed more relaxed and able to tolerate things. The child's mother testified he had not done well on Paxil, but had responded to Risperdal (Tr. 440-442, 33-33).

71. Although Ms. Gerber reported the child reacted well to music therapy; she did not utilize song to introduce new concepts or pre-academics to the child. Neither she nor her assistants did much singing with the child. Ms.

Gerber stated she was not musically inclined. The child was able to learn the skills she taught in spite of her failure to sing (Tr. 421, 449-450).

72. Ms. Gerber identified the form titled "Cognitive Readiness" Skills" incorporated in the school-age MFE at page 36 as having been completed by her and supplied to the Parma City School District perhaps in February, 2003. She represented that, assuming the skills identified on the checklist are in fact appropriate indicators of kindergarten readiness, the child was prepared for kindergarten (Tr. 457-459).

73. Ms. Gerber was an IEP team member and attended the meeting on June 2, 2003. She participated with Kim Tomco, a special education teacher in the Parma school district, in the creation of some of the goals and objectives of the IEP. Based on her conversations with Ms. Tomco, the meeting discussions and the document, it "sounded fine", i.e., as though the child could be served in a special education classroom in the Parma City School District. However, Ms. Gerber qualified her statement by indicating that, as a mom, she understands wanting "the best" for your child (Tr. 462-463).

74. Ms. Gerber believed the child would benefit from a school environment with more typical peers, provided the appropriate supports and guidance were available (Tr. 463-464).

75. Dr. Morris Levinsohn graduated from medical school in 1963 and has practiced his profession with distinction for 33 years. Initially, he focused on pediatrics and then moved into pediatric neurology. Approximately 18 years ago, he became interested in neurobehavioral disorders of children, and particularly autism. Since

that time, he has had approximately 2000 patients with autistic spectrum disorder. Dr. Levinsohn initially met the child in November, 2000. His parents expressed concerns related to his behaviors, including temper tantrums, difficulty with transitions, a number of unusual and repetitive body motions, as well as his overall developmental delay, particularly in the area of speech and language (Tr. 307-309).

76. During the period November, 2000 through October, 2003, Dr. Levinsohn saw the child during office visits with his parents a total of four times. The initial visit was at least 90 minutes in length; follow up visits ranged from 40 to 60 minutes. In addition, he has spoken with the child on at least four additional occasions since April 2, 2003, because Dr. Levinsohn and the child's mother are employed at the same medical facility. During vacation time, the child is often present at the hospital. On average, these informal observations were 15 minutes in duration (Tr. 314-317).

77. Dr. Levinsohn's initial assessment of the child was based on a physical examination, a neurological examination, an interview with the parents and a concurrent observation of the child during the interview process (Tr. 318-319).

78. Dr. Levinsohn was principally involved in administering pharmacotherapeutic agents to modify and modulate some of the child's behaviors (Tr. 312).

79. Dr. Levinson's "firm medical recommendation" with respect to the child included one-on-one interventions, intensive accommodations to include individual speech therapy, individual occupational therapy, and music therapy. He represented one-on-one instruction was

critical for the child to succeed in the school setting (Tr. 313-314).

80. On cross-examination, Dr. Levinsohn acknowledged his letter dated April 2, 2003 that incorporated the bulk of the recommendations set forth in Finding 79 above was "based purely on information provided from his parents". Dr. Levinsohn has never observed the child in a classroom setting, nor has he observed him interact with other children. Dr. Levinsohn responded in a similar vein to a query regarding music therapy; he stated his recommendation was not based on personal observation; rather, the parents report the child ". . . loves music, enjoys music. It quiets him down. It restores some sort of order for him. In that musical setting, he seems to show far fewer of the aberrant behaviors described in the past" (Tr. 323, 326, 332, Petitioner's Exhibit 9, 77-78).

81. Dr. Levinsohn recently diagnosed the child to have a disruptive behavior disorder, based on his emerging aggressive behaviors, oppositional behaviors, defiant behaviors, and features suggesting increasing frustration. No new assessments were utilized to establish this diagnosis; rather it was predicated on his historical profile, information provided by his parents and their "identifying these aggressive behaviors in all domains of functioning in all areas including schools and public places." No such behaviors were ever observed by the physician either in his office or on a one-to-one basis (Tr. 313, 319-322).

82. Dr. Levinsohn acknowledged the various recommendations contained in his letter of April 2, 2003, with respect to the educational placement of the child and appropriate related services would represent

the absolute "best case program" for the child (Tr. 342, Respondent's Exhibit 9).

83. Julie Peacock is an occupational therapist employed by the Parma City School District. She received her undergraduate degree from John Carroll University in 1989; thereafter she completed her master's degree in occupational therapy at Rush University in Chicago, Illinois in 1992. After graduation she was employed at MetroHealth Center in Cleveland, Ohio, where she was selected for certification in neurodevelopmental techniques for rehabilitation purposes. After holding various other positions in her field, she was hired by the Parma City School District approximately five years ago. She is certified as an occupational therapist by the state of Ohio, Ms. Peacock estimates she has about 30 credits accumulated in conjunction with maintenance of state licensure, with the bulk of them dealing with issues autistic children face (Tr. 290-293).

84. Ms. Peacock has neither met nor observed the child. She has reviewed the occupational therapy final summary prepared by the Achievement Centers, the therapist's notes and the Peabody Developmental Scales. In addition, approximately one to two weeks prior to the scheduled IEP meeting, Ms. Peacock conversed with the direct OT instructor at the Achievement Centers on two occasions for approximately 30-40 minutes total; the primary thrust of these discussions was the child's IEP goals and his progress (Tr. 294-295, 304).

85. Ms. Peacock was an IEP team member; she discussed the child with the parents; however she was not comfortable drafting IEP goals and objectives for a child she had not seen. Instead, she recommended the child be evaluated at the beginning of the school year;

in this manner, the goals would be tailored to the current abilities of the child and would take into consideration any potential difficulties associated with a new school and foreign environment. Also, the parents expressed concerns that no sensory goals were incorporated in the child's prior IEP; it was Mr. Peacock's intention to identify specific sensory issues in order to create an appropriate goal. The evaluation was to be part of an overall functional behavior assessment and was to be completed by September 30, 2003 (Tr. 297-298).

86. The evaluation was to include a sensory inventory, assessment of fine motor skills, and assessment of visual perception needs utilizing the Visual Motor Integration test and the Motor Free Visual Perception Test (Tr. 299-301).

87. Although occupational therapy was designated as a special education service to be provided in the summary section of the last page of the IEP, neither the OT goals and objectives, nor the LRE for provision of services, nor the duration of occupational therapy services was set forth in the proposed 2003-2004 IEP (Tr. 304-305, Respondent's Exhibit K).

88. After the completion of the school-age MFE and prior to the June 2, 2003 IEP meeting, the Parma City School District selected two staff members to visit the Achievement Centers East and observe the child in the school setting. These individuals were Michelle Munici, a speech language pathologist, and Kim Tomco, a special education teacher with a self-contained classroom serving kindergarten through third grade multihandicapped students. The purpose of the visit was to determine whether the child would be an appropriate fit for educational placement within the

Parma City School District; the observation took place on May 21, 2003. Ms. Tomco and Ms. Munici were at the school for approximately 3.5 hours; the actual observation was for somewhat less a time frame. (Tr. 265-266, 477-478, 489).

89. Ms. Tomco and Ms. Munici arrived prior to the start of school. When the child arrived, Ms, Gerber introduced the teachers to him; and the child was able to say hello. The child engaged in conversation immediately; he told them about a computer game he played the night before (Tr. 267).

90. Ms. Munici is a graduate of Cleveland State University. She received an undergraduate degree in speech language pathology in 1989 and a master's degree in speech pathology in 1991. She has been employed a total of twelve years in her field, with the last four as a speech pathologist in a school setting (Tr. 264-264).

91. Ms. Munici spoke with the child's lead teacher as well as the speech therapist. They discussed the fact that the child engaged in temper tantrums, particularly when he was engaged in a nonpreferred task. Ignoring the behaviors had achieved some positive results. The teacher also indicated the child was able to generalize his academics. Both individuals stated the child engaged in more appropriate behavior when he had more appropriate peers. The speech therapist noted his speech had a quick rate of speed and could be difficult to understand at times. (Tr. 266, 267, Respondent's Exhibit 8, 269).

92. The child socialized with other students in the class. He was able to follow the routines of the school. He interacted very well with adults and was able to express his needs to them. The child was attentive to the

instruction and participated in circle time activities. The teacher indicated the child was having a "pretty good day" and expressed surprise that the child had not exhibited resistance to any activities (Tr. 268-270).

93. Based on her observations of the child, discussions with staff at the Achievement Centers, review of the final summary prepared by the Achievement Centers, Ms. Munici prepared the IEP the language/communication goals incorporated in the child's proposed 2003-2004 IEP. These goals were intended to continue his speech language development and to build on skills he had mastered at the Achievement Center. The goals addressed (1) use of language as a tool to interact appropriately and (2) improvement of the child's expressive language skills. There are three corollary objectives attached to each goal. (Tr. 271-273).

94. In the "Least Restrictive Environment" column, the proposed IEP indicated the child would receive speech language therapy "in a separate setting but learned skills will be practiced in the classroom". Ms. Munici identified her use of the word "classroom" to mean a carryover of his instruction into any naturalistic setting, including the special education classroom, the music room, the library, lunch, and recess (Tr. 273-274).

95. Direct services in a small group setting would be provided for 60 minutes per week, and work on speech goals would then be carried on throughout his entire day, just as it was at the Achievement Centers (Tr. 282).

96. Kimberly Tomco received her undergraduate degree from Cleveland State University in 2000. Her major was special education; she is employed as a moderate to intensive intervention specialist and is certified for

grades pre-kindergarten to 12. At present, she is completing her master's of education at Baldwin-Wallace College. This is her fourth year as an employee of the Parma City School District (Tr. 477).

97. Ms. Tomco heads a cross-categorical classroom and has had three or more autistic students in her care each year (Tr. 477-478).

98. Ms. Tomco described her conversation with Jacqueline Gerber on the day of her visit to the Achievement Centers East to observe the child. Ms. Gerber stated the child requires high motivation. He was grade-level appropriate with respect to the academic skills needed for kindergarten. He was able to sort, match, knew some letters and numbers to 20. He could sequence pictures, order by size; he knew patterns, color words, and had recently been introduced to number words. He could generalize these skills. With respect to self-help tasks, the child was independent in cleaning up, brushing his teeth and dressing in the bathroom. He did require help with fasteners (Tr. 479, Respondent's Exhibit S, 267-268).

99. Ms. Gerber indicated the child has a tendency to pick on the lower functioning kids because he understands what can set them off. As a result, she suggested a more appropriate placement for him might involve a classroom consisting of higher functioning kids (Tr. 479).

100. Throughout the day, the child transitioned without an issue. When the timer went off, he would check his schedule and move to the next activity. No behavioral tantrums were observed (Tr. 482).

101. Ms. Tomco observed the child at a TEACCH independent work station. He was working on three activities – a Letter A worksheet, stringing the letter A, and an accounting file folder. An adult was present who provided minimal verbal cues and the motivation of a sucker upon completion of all three activities. Ms. Tomco considered the physical structure of her classroom to be similar, with each area clearly visible and discernible as to its purpose. At work time, individual work systems are utilized to provide the students with the amount and sequencing of tasks, as well as the reward for completion. The children use visual picture schedules, and the staff provides visual cueing frequently throughout the day (Tr. 480-483).

102. Prior to leaving the Achievement Centers, Ms. Tomco and Ms. Gerber discussed which classroom at Pleasant Valley Elementary would be more appropriate for the child. It was determined Ms. d'Aliberti's classroom would be preferable, as the students in that room were verbal peers, social peers and more academic peers (Tr. 485).

103. Based on her knowledge of Pleasant Valley Elementary School, her observation of the child and review of the documents provided, Ms. Tomco stated the school would offer an appropriate educational placement for the child. Services are provided based on the child's individualized needs. The classrooms are highly structured in centers. Visual cues are utilized. Behavior plans are individualized for each child, with regular assessment and modification as needed. Speech and occupational therapy are provided in small group settings and are addressed throughout the day across all settings. Adapted specials, physical education, music and art are tailored to the student's special needs (Tr. 485).

104. Ms. Julie d'Aliberti graduated in 1985 from Kent State University with a major in hearing impaired education; the following summer, she completed the course work necessary for a certificate in elementary education. In 1991, she received her master's degree in multihandicapped education from Cleveland State University. She has been employed as a teaching professional since 1986 and has held her current position in the Parma City School District since 1991.

105. Ms. d'Aliberti's classroom consists of eight students in the morning session and six students in the afternoon session, although in the afternoon, one student follows an inclusion schedule which causes her to be out of the classroom for one to two hours each afternoon. Ms. d'Aliberti has two full-time classroom assistants (Tr. 525-526).

106. In the past Ms. d'Aliberti has sung lessons to a student who responded to the rhythmic tune and seemingly functioned better. She expressed a willingness to do this; otherwise, songs and music are primarily incorporated into circle time and end of day clean up (Tr. 527-529).

107. Exposure of students to typical peers occurs in the cafeteria, at recess with typical peers outside and, when possible, use of classroom visits by older students, e.g., a fourth grader, is incorporated for play purposes. In addition, the class includes three children whose behavior is such that they can serve as peer models because they play like kindergartners and otherwise exhibit age-appropriate skills (Tr. 532-534)

108. The design of the room and structure of the activities in Ms. d'Aliberti's classroom are similar to that of the Achievement Centers. The classroom is divided into

discrete areas including a Legos center, although the actual activity is diversified and not always Legos, a play area, a listening center, a book station, and two work centers. The play area has walls on three sides and a strip of blue tape on the fourth side – a line of demarcation so toys do not come flying out. The listening center is in a cut out of the classroom, with no distractions. The book station has walls on three sides with a bookshelf Children can relax on a bean bag or in a chair and look at books. The work stations are segregated to avoid distractions; they have two walls and a table. Fifteen-minute one to one sessions are provided to each child at least twice in the morning and three times in the afternoon (Tr. 520-523).

109. Ms. Tomco and Ms d'Aliberti collaborated to formulate proposed annuals goals and short-term objectives for the child's proposed 2003-2004 IEP. These goals and objectives were based on Ms. Tomco's observations and discussions with Achievement Centers personnel, a review of the child's school age MFE and various additional documents including the final progress summary prepared by Achievement Centers. The goals were based on recognized needs of the child; and Ms. d'Aliberti, who would have been the child's classroom teacher, had a concise understanding of the manner in which such objectives would be carried out in the classroom setting. These goals addressed (1) independent play with a peer during an interactive play activity. (2) following verbal direction the first time given and (3) transitioning to new activities throughout the school day. Goal 1 was accompanied by three short-term objectives. Goals 2 and 3 each had two appropriate short-term objectives (Tr. 536-540, Respondent's Exhibit K).

110. Typical motivators utilized in the Ms. d'Aliberti's classroom are individualized to the child. These include verbal praise, pats on the back, engaging in a favorite play activity, 15 minutes on the computer, 5 minutes at the listening center, a red, yellow and green light system for behaviors, and prize boxes. The child's IEP specifies a proactive reinforcement program was to be established after one week of school, the intent being to create a master list of reinforcements to be used as motivators in different types of circumstances (Tr. 539-541).

111. Speech language goals are worked on regularly in the classroom setting. Each short-term objective contained in the child's IEP can be addressed during the course of other activities. For example, responding to greetings by peers is an integral part of morning circle time when classmates discuss how they feel. One student who is very receptive to saying hello may speak to the child, and the teacher or her assistants would encourage him to respond (Tr. 541-543).

112. Similar carryover activities would also occur with respect to occupational therapy goals. Although occupational therapy typically occurs as a pullout to a separate room, it is not uncommon for the occupational therapist to request the classroom teacher to work on particular goals or objectives. For example, if the child has sensory needs, the occupational therapist would demonstrate to the teacher the appropriate positive sensory input, and such input may be applied prior to a work session to calm the child down. Another example would involve fine motor goals such as cutting or letter writing that can be pursued in the classroom setting, after the teacher is provided with work samples and an understanding of how far to "push" the child to accomplish the goals (Tr. 542-543, 552-553).

113. Yvette Peck Newlin is currently employed in the Cleveland Heights-University Heights City School District. During the period 2000 to 2003, Dr. Newlin was special education supervisor in the Parma City School District. In this capacity, she was familiar with the child and his parents from the initial MFE and subsequent provision of services to him as a preschooler through the first year of his placement at Achievement Centers. She recalls attending the IEP meeting during the period March to May, 2002, at which time extended school year services were approved for the child. Although she remained with the school system through June, 2003, Dr. Newlin had no further contact with the child or his program due to time constraints. Dr. Hudgins assumed responsibility for IEP meetings involving the child (Tr. 599-602, 613).

114. Dr. Newlin received a bachelor of science degree in physical education in 1972 at State University College at Rockport. She received her master's degree in adaptive physical education from Indiana University in 1973. In 1986, she completed all requirements for a doctorate in adaptive physical education and psychology, MRDD, from Ohio State University. She earned a principal's certification from Cleveland State University in the 1990's. Dr. Newlin has taught in numerous settings over the years, ranging from high school teacher, an instructor at the university level, a consultant-teacher for a school district, a teacher at a residential facility for deaf and blind children, various positions with the Cuyahoga County Board of Mental Retardation including county director of physical education, and special education supervisory positions at Bedford, Parma and Cleveland Heights-University Heights (Tr. 589-590).

115. As a part of her job responsibilities, Dr. Newlin visited Monarch School for an observation. The basis for this visit was not connected specifically to the child, but rather occurred as a part of observations of three local facilities that provide services to students with autism. The Monarch visit took place in the summer months and lasted approximately 60-90 minutes. Dr. Newlin was given a tour of the facilities in the company of a Monarch associate director; the observation provided a very basic overview of the school's setup and some of the services provided. Dr. Newlin described the physical structure of the school as unlike that of a typical elementary school; it is "set up almost like little office spaces". Each child had a schedule and moved through the spaces for work purposes; Instruction observed by Dr. Newlin was "either one on one or one on two at the maximum". Dr. Newlin did not view any supervised play or similar type of group activity (Tr. 602-605).

116. Based on her knowledge of the child and her general observation of Monarch School, Dr. Newlin stated she did not consider it an appropriate fit, as the child was "very social" and would benefit from observation of, and interaction with, typically developing peers. The child was capable of modeling skills and behaviors (Tr. 605)

117. Based on her knowledge of the child's skill level, which is somewhat dated, and her familiarity with the self-contained classrooms at Pleasant Valley Elementary School in the Parma City School District, Dr. Newlin testified the child could "definitely" be served there (Tr. 606). This opinion was based on the structure of the classrooms, the expertise of the staff, the opportunities to be associated with typical peers, the opportunities for development of language, play and

academic skills, and ultimately the possibility to mainstream into a regular kindergarten classroom, even if only on a very limited basis (Tr. 607).

118. Dr. Judy Hudgins is employed by the Parma City School District as Supervisor of Special Education. Her educational background consists of an undergraduate degree in speech language pathology from the University of Akron (1976), a master's degree in speech pathology from the University of Alabama (1977), and a doctorate in educational administration supervision and special education from the University of Akron (1990). Prior to enrolling in the doctoral program in 1987, Dr. Hudgins held positions as a speech pathologist at the Columbus State Institute in Ohio and the Lovett Independent School District in Texas. After receiving her Ph.D., she was employed at Kent State University for several years, initially as an interdisciplinary training coordinator for the Family, Child a d Youth Center, servicing individuals in the master's programs for early childhood degrees and later in a program teaching the core course work for individuals preparing to teach in the field of multiple and orthopedic handicaps. Since leaving the university, Dr. Hudgins has held the position of Supervisor of Special Education in the Cuyahoga Falls school system for five years and has been employed in the Parma City School District for four years (Tr. 659-662).

119. Dr. Hudgins conducted an observation of the child during his receipt of extended school year services at the Achievement Center on July 17, 2003. The purpose of her visit was to observe two students who could potentially be participating in the Parma extended school year program scheduled to begin August 4, 2003, and to make preparation for any needed transitions (Tr. 662-663).

120. The visit consisted of approximately two hours in total, and roughly one-half of that time was spent in observation of the children. Both were in the same classroom. During this period, Dr. Hudgins observed the child at a reading station in a 1:1 setting, waiting until the snack station was available, at the snack station, and at outdoor recess or play time. The balance of the visit focused on discussions with staff members, a review of the work stations and various features that were unique to the Achievement Center's instructional setup that could be transferred to the Parma school system for use with the child (Tr. 663-667).

121. Based on Dr. Hudgins' knowledge of the primary self-contained special education classrooms in Pleasant Valley during her tenure of service in the school system, her observation of the child, and any other familiarity she might have with him, such as serving as an IEP team member, Dr. Hudgins stated the child could be appropriately served in one of those classrooms. This opinion was based on her belief that the child's profile indicated a number of kindergarten readiness skills. While all of those skills are not perfect, he appears to be a child who could fare well in that program. He is verbal and ambulatory. He is able to initiate, ask questions and comment about things (Tr. 667-668).

122. At present, Susan Rueger serves as the principal of Pleasant Valley Elementary School, a position she has held for four years. She was assistant principal of the building for two years as well. Prior to that time, Ms. Rueger was employed as a classroom teacher in elementary buildings for 22 years. Ms. Rueger holds a bachelor's degree in elementary education from Heidelberg College in Tiffin, Ohio, and a master's

degree in administration and supervision from John Carroll University (Tr. 625-626).

123. Ms. Rueger describes the school as "diverse". In part, that diversity is attributable to the significant population of children with special needs that range from speech or occupational therapy requirements to needs that are more comprehensive and would require a multi-handicapped or cross-categorical classroom. There is also a gifted program (Tr. 626).

124. The building staff includes five inclusion teachers. There are a total of nine self-contained special education classrooms. These classrooms are cross-categorical in the sense that varying disabilities are accommodated within a single setting. There are students with developmental handicaps or orthopedic needs, some severe emotional disorders, although not significant ones, and a total of 21 autistic students in the building (Tr. 627).

125. Ms. Rueger is not familiar with the child who is the subject of this due process hearing, other than by name. She is aware that the school proposed placement of the child in Mrs. d'Aliberti's classroom which is a setting designed for children with a strong need for structure, routine and academic concentration. With the exception of the resource room, it would be considered the highest functioning primary special education classroom. The students in the resource room either spend about 50 per cent of their day in an inclusive environment or are moving toward inclusion at a somewhat faster pace than the children in Mrs. d'Aliberti's classroom (Tr. 629-630).

126. Pleasant Valley Elementary School has a service club consisting of 42 students in grades 3 through 6 who

volunteer to visit special education classrooms as typical peers. In addition, there are numerous school activities that call for participation by all classrooms and students; these programs include parades, assemblies and special events that focus on holidays such as Veterans' Day or other appropriate and timely occasions. Finally, all special education students have opportunities for interaction with typically developing peers at lunchtime and during recess on the playground. In the case of special needs children who are capable of imitating behaviors, these opportunities to interact with typical peers can be beneficial (Tr. 631-633).

127. Ms. Rueger indicated the school curriculum includes adaptive special education, adaptive music, and adaptive art. Class sizes are six to seven students. If the child were to attend the school, he would participate in each of these classes. Adaptive P.E. addresses the specific goals and objectives contained in each child's IEP in the context of a gym class, while adaptive music works on a variety of skills, including listening, sensory issues, hearing patterns, instrument playing and music appreciation. Parts of adaptive music are therapeutic in nature, but the class is not music therapy per se. Adaptive art incorporates a variety of activities such as cutting and gluing, working with various material types and textures, and some computer use, with each of these pursuits geared to addressing the goals and objectives set forth on a child's IEP. Art is 60 minutes per week, while music and physical education are twice a week for 35 minutes, or a total of 70 minutes each (Tr. 634-636, 641).

128. Beverly Miller has been employed by the Parma City School District since 1983. Her positions have involved instruction at the elementary school level. At present, she is assigned full-time at Pleasant Valley

Elementary School where she teaches a typical music curriculum in the morning and adaptive music in the afternoon. Ms. Miller holds a bachelor's degree in music education from Baldwin Wallace College and a master's degree in supervision from the same institution. Ms. Miller is not a certified music therapist; however, she utilizes a music therapy approach in her adaptive music classes. Adaptive music is taught to approximately 60 special needs students in groups varying in size from five to eight. Two aides provide classroom assistance. During the time Ms. Miller has conducted adaptive music classes, she has taught 50 to 60 autistic children (Tr. 492-494).

129. Beverly Miller described a typical adaptive music class. It begins with a hello song. Ms. Miller greets each child individually, establishes eye contact and elicits a response from the child. The hello song is followed by a mirror song; the mirror song is geared to recognition of oneself and one another. Next are two movement songs that change seasonally, e.g. at the time of the hearing, the children were walking to the Alfred Hitchcock theme song and dancing to the Monster Mash. Movement songs may involve the need to follow directions, based on changes in beat or melody. The next sequence addresses gross and fine motor skills, with the use of instrument playing, followed by seasonal poetry and musical toys. The last ten minutes of the class are geared to relaxation. This segment typically includes singing "Our World is a Rainbow" as a disco ball turns and throws off rainbow-like colors, followed by "Music Time is Over". The songs utilized throughout adaptive music are intended to target skills such as following directions, steady beat or rhythm recognition, acknowledgment of visual contact, socialization, proper greeting and closing (Tr. 497-504).

130. Kate Foley is employed by the Educational Service Center of Cuyahoga County as a special education supervisor for multiple districts. Educational Service Center is a partner with the Achievement Centers in the operation of two preschools for children with autism one in Cleveland and one in Lakewood. The goal of the partnership is to provide a preschool environment where children who have not been successful in their home district preschool setting with typically developing peers can be instructed utilizing appropriate methodologies and programs to allow them to develop sufficient skills to return to their home district and make a successful transition back into that setting (Tr. 351-352, 355).

131. Ms. Foley holds an undergraduate degree in special education and teaching certificates as elementary K-8 and developmentally handicapped. She also possesses a master's degree in administration, specifically supervision, that was awarded in 1996. At present, she anticipates receipt of her doctorate in administration in 2006 (Tr. 353).

132. Ms. Foley has more than ten years' experience as a classroom instructor, initially as a substitute teacher for the Cuyahoga County Board of Mental Retardation and thereafter as a special education teacher in the Olmsted Falls School District. She was involved in the development of a consortium between her district and the North Olmsted School District for the provision of services to autistic children. She has been employed at Educational Service Center for approximately five years and has multiple responsibilities. In addition, she has served on the Ohio Department of Education Alternate Assessment Committee for a number of years. Ms. Foley has been working with the

Achievement Center through her job at ESC for three years (Tr. 353 -354).

133. Ms. Foley estimated she had observed the child at the Achievement Centers on approximately 20 to 25 occasions or more during the two years he was a student there. During that period, the child has come up and talked to her; and she has interacted with him. She has seen him in his structured TEACCH session, viewed him with his classroom teacher, the occupational therapist, and speech therapist and has observed him on the playground. Ms. Foley also attended IEP meetings and progress review meetings for the child and discussed his progress with his teacher (Tr. 356-359).

134. The model for the Achievement Centers is not based on a single methodology; multiple methodologies are employed. It is intended to fit the program to the child rather than require the child to fit the program. In order to accomplish this, it is necessary to ascertain what techniques and settings provide the best results for a given student (Tr. 360).

135. The child's attendance at the Achievement Centers provided some opportunities to interact with typical peers from a day care center located adjacent to the facility. Ms. Foley did not know the frequency of occurrence of interaction. Mary Beth Koss, manager of the education department at the Achievement Centers subsequently testified that, in the past few years, such opportunities were limited to interaction in the outdoor playground area once a day (Tr. 361, 369-370, 388-390).

136. Members of the Achievement Centers staff compile the end-of-year reports with respect to the child and

participate in a team meeting to determine the propriety of transition activities back to the school district. Ms. Foley stated she was involved in these activities and was familiar with the information contained in the child's progress summaries. Based on her involvement with the child and the process and the information contained in the progress summaries, Ms. Foley testified it would be appropriate to put the child into a special education classroom in a public school environment for his kindergarten year. The child had demonstrated progress throughout his attendance at the Achievement Centers and possessed the necessary skills to transition into a special education kindergarten classroom in a public school setting (Tr. 361-363).

137. There is no partnership between Educational Service Centers and Monarch School, nor does it appear that one exists between Achievement Centers and Monarch School. However, the parent represented the facilities were "sister schools" that were operated utilizing the same methodology. (Tr. 364-365, 74-75).

138. Toni Giannone is a speech language pathologist who designs programs for children with autism. She holds an undergraduate degree from the University of Connecticut in speech language pathology and a master's degree in the same field from Western Michigan University. Since graduation in 1973, she has both attended and presented at numerous workshops and programs in her area of expertise. Approximately four years ago, Ms. Giannone was approached by Bellefaire Jewish Community Board, the underlying support organization for Monarch School, and asked to assist in the development of a program for autistic children. Ms. Giannone stated she designed the program, developed the building, interviewed teachers, staff and parents, developed a

case load, structured the curriculum and obtained certification of the program from the state of Ohio. The building that currently houses Monarch School was originally a dormitory (Tr. 678-679, 686).

139. The basic concept of Monarch School is twofold – first to provide an individualized program because autistic children are very unique and have individualized needs and second to utilize a variety of staff in different disciplines to create a team approach in working with the students. Instruction is initiated utilizing a very small ratio typically one to one; and the ratio is gradually expanded, with the ultimate goal to provide the children with sufficient skills and tools to permit them to be mainstreamed back into their home school districts (Tr. 680-681).

140. Typically, a child moves from class to class in one-half to one-hour segments with periodic group interaction depending on the needs of the child. Such interaction could occur in recess or play time, a gross motor class or a social skills training class. Speech and language therapy are embedded throughout the program. Since the inception of the program, there have been approximately 60 students; of those, only five began instruction in a broader environment than one-on-one (Tr. 687-689).

141. Factors to consider in making a determination as to whether a child can be mainstreamed include: (a) academic levels, although these do not need to be exactly on grade level, but rather possessing the skills to lead to grade level, (b) need for support, (c) ability to interact with other children, (d) ability to modulate sensory information, i.e., possessing strategies to handle a larger grouping or school (Tr. 687).

142. Ms. Giannone identified the development of social skills as necessary in order for a child to be successful in mainstreaming. She defined social skills training as beginning with social stories, basic turn taking, conversational exchange, sharing, all the way up to more abstract reasoning, interacting with other children while maintaining a conversational exchange for two to three utterances (Tr. 684).

CONCLUSIONS OF LAW

A. The applicable procedural requirements of the IDEA as set forth at 20 U.S.C. 1415 et seq. were satisfied after the filing of the parents' request for due process and throughout the preparation and conduct of the hearing.

B. The child is a "child with a disability" as that term is defined in 34 C.F.R. § 300.7(a). He has been determined to be autistic. Autism is defined at 34 C.F.R. § 300.7(c)(1)(i), as:

> . . . a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evidenced before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences . . . .

C. The Parma City School District is a "local educational agency" as that term is defined in 34 C.F.R. § 300.18.

D. As a child with autism, the child is entitled to a free appropriate public education, meaning special education and related services that (a) are provided at public expense, under public supervision and direction, and without charge, (b) meet the standards of the state educational agency, including the requirements of this part, (c) include an appropriate preschool, elementary school, or secondary school education in the state involved, and (d) are provided in conformity with an IEP 20 U.S.C. § 1401(8).

E. The Parma City School District offered the child an IEP for the 2003-2004 school year that provided special education and related services for six hours per day with the bulk of services provided in a special education kindergarten classroom at Pleasant Valley Elementary School, consisting of a total of six to eight children, a teacher and two aides. Inclusion with nondisabled peers was incorporated at recess lunch, school assemblies and programs. Parents alleged the program offered did not provide the child a FAPE and sought placement in a specialized autism program at the Monarch School. The party alleging the denial of a free appropriate public education or challenging the adequacy of an individualized education program bears the burden of proof Cordrey v Euckert, 917 F.2d 1460, 1469 (6th Cir. 1990) *cert. denied* 499 U.S. 938 (1991). Petitioners failed to establish by a preponderance of the evidence that the program proposed by the school district did not offer the child a free appropriate public education designed to provide educational benefit to the child.

F. The contents of the IEP document offered in association with the 2003-2004 school year are substantially consistent with the requirements of the IDEA 20 U.S.C. 1414(d) et seq; 34 C.F.R. § 300.347(a), with the exception of the section covering the provision of occupational therapy services to the child. The IEP does not include the frequency, duration and least restrictive environment for these services. However,

given the current level of the child's fine and gross motor skills, the areas of need delineated in the Achievement Centers' final summary that related primarily to modifications designed to improve the child's environment, the minimal delay in provision of such data, i.e., less than 30 days, and other factors, as set forth in Law and Argument below, this deficit is not considered to be substantive.

G. The parent was provided an opportunity to equally participate as a team member in the IEP process. Such participation requires the other team members to afford the parent(s) an opportunity to share information and voice concerns regarding the development of the child's IEP. However, where consensus is not possible, the ultimate responsibility for the provision of FAPE to a student rests with the school district 34 C.F.R. § 300, Appendix C, Question 9.

H. Independent opinions offered by outside providers and consultants such as Dr. Morris Levinsohn, the child's pediatric neurologist, are to be reviewed and considered by IEP team members together with all other relevant data, when creating an IEP for a child. It is not necessary that a school district "embrace" such opinions G.D. v. Westmoreland School Dist., 930 F.2d 94, 947 (1st Cir. 1991).

I. Petitioners seek a program with intensive speech-language interventions, music therapy and one-on-one instruction throughout the course of the school day. Dr. Morris Levinsohn recommended the child be afforded an educational placement that incorporated these requirements and stated it would represent the absolute "best case program" for the child. Similarly, Ms. Gerber, the child's teacher at the Achievement Centers and an IEP team member who believed the child could be served in a special education classroom in the Parma City School District, qualified her statements by indicating that, as a mom, she understood

wanting "the best" for your child. However, the IDEA does not require an ideal education or the best education available for a certain child Klein Indep. Sch. Dist., 29 IDELR 670, 675 (Texas, 1998). As enunciated in Bd. of Educ. v. Rowley, 458 U.S. 176 (1982), maximization of a student's potential is not required. Rather, the statute mandates a public school provide sufficient specialized services so that the student benefits from his education. The IEP offered by the Parma City School District meets this standard.

J. While music therapy is recognized as an appropriate related service where the IEP team determines it to be necessary for the child to benefit from special education and to receive FAPE, the testimony offered at hearing by the child's lead teacher at the Achievement Centers demonstrates that, while music therapy may be beneficial to the child, it is not essential. Ms. Gerber represented she did not use music or sing as a part of her instruction of the child and he "still picked up his skills"; in fact, she described the child's greatest gains during his second year at the school to be in the area of pre-academic skills, i.e., the area of instruction for which she was primarily responsible Letter to Farbman, 34 IDELR 7 (OSEP, Apr. 5, 2000).

K. The parents stress the importance of the TEACCH methodology in achieving educational success with the child and seek its utilization in the child's educational program. However, the evidence presented at hearing indicates the child responds to the structured nature and relatively isolated learning environment provided by the independent work stations that form a part of TEACCH. A comparable work center structure is in place in the special education classroom at the Pleasant Valley Elementary School. In addition, methodology disputes are typically left to the discretion of the school district so long as the chosen methodology provides FAPE Lachman v. Illinois State Bd. of Educ., 853 F.2d 290 (7th Cir. *cert. denied* 488 U.S. 925 (1988).

L. The parents allege the IEP proposed for the 2003-2004 school year provides inadequate amounts of one-on-one instruction. However, the parents have not demonstrated a specified need for these levels of service in order for the child to receive educational benefit. Although a child has made progress in a low student/teacher ratio setting, it does not automatically follow that he would be unable to make satisfactory progress in a class with a higher student/teacher ratio setting Bd. of Educ. of City Sch. Dist. of the City of N.Y., 34 IDELR 54 (N.Y. 2000). In addition, it is necessary to weigh the relative benefits of intensive interventions versus opportunities to play with other children, use developing language skills with others, including nondisabled peers, and to generalize skills and concepts learned in one-on-one and small group environments La Mesa-Spring Valley Sch. Dist., 30 IDELR 191 (CA. 1999).

M. The parents allege the IEP proposed for the 2003-2004 school year provides inadequate amounts of speech language therapy. Previously, the child had received a minimum of 90 minutes per week; this amount was set at 60 minutes per week, with at least one small group pullout, in the proposed IEP. Both programs represent generalization of speech language therapy and goals to be embedded into the classroom structure. It is uncontroverted the child continues to require speech language therapy; however, it has not been demonstrated that a quantifiable amount of such therapy is required. As stated in Conclusion of Law L above, it does not automatically follow that progress at a specified frequency/duration of services and LRE excludes the possibility of satisfactory progress at a varied or reduced level Bd. of Educ. of City Sch. Dist. of the City of N.Y., 39 IDELR 54 (N.Y. 2000).

N. The IDEA and its implementing regulations, and specifically 34 C.F.R. § 300.347 require the school district to provide special education and related services designed to

provide an educational benefit to the child in an inclusionary environment, i.e., with disabled and nondisabled students, to the maximum extent appropriate. Based on the testimony presented at hearing as to the child's progress, current abilities, and special needs, as well as the continuum of placement options set forth in the IDEA at 20 U.S.C. § 1412(a)(5)(A) and 34 C.F.R.§ 300.551, the appropriate least restrictive environment for the child is within a special class, such as the special education kindergarten classroom at Pleasant Valley Elementary School. This is the placement offered to the child in the proposed 2003-2004 IEP.

DECISION

In light of the foregoing Findings of Fact and Conclusions of Law, it is hereby decided that:

The relief sought by the petitioners is denied. The parents have failed to establish by a preponderance of the evidence that the IEP recommended for the 2003-2004 school year did not provide a FAPE to the child. The individualized education program offered takes into consideration the results of the school-age muitifactored evaluation and other evaluations, appropriately identifies the child's needs, establishes annual goals and short-term objectives which are intended to address the child's educational deficits, and establishes the appropriate least restrictive environment for the provision of special education and related services. The educational program offered is reasonably calculated to provide educational benefit to the child.

As a result of the determination that the IEP recommended for the 2003-2004 school year offers an appropriate educational program and placement to the child, the petitioners are not entitled to reimbursement for tuition and transportation costs in association with their private

placement of the child at the Monarch School for the 2003-2004 school year.

LAW AND ARGUMENT

As previously discussed, the issues presented for determination in the due process setting were set forth by the Petitioners generally as follows:

1) The placement proposed in the child's 2003-2004 IEP is not appropriate. Placement in a specialized autistic program such as the Achievement Centers proved very successful for the child, and his education should be continued in a comparable setting such as the Monarch School. Although the IDEA contains strongly preferential language for mainstreaming, inclusion is not necessary when the regular classroom provided an unsatisfactory education. See, e.g., Beth B. v. Van Clay, 282 F.3d 493 (7th Cir.) 2002.

2) Petitioners consider the school district's proposed change of placement from a specialized autistic program environment to a special education classroom at Pleasant Valley Elementary School in the Parma City School District to be an unauthorized change of placement. The parents do not approve and have filed for due process as their right.

3) Where a more restrictive program has been shown to be successful, the burden of justifying a new IEP, including placement, shifts to the school district Bd. of Educ. of the County of Kanawha v. Michael M., 95 F. Supp 2d 600 (S.D. W. Va.) 2000. Given the child's success at the Achievement Centers and currently at Monarch School, coupled with a previous negative history of the child in the Parma City School District, his

current placement at Monarch School is appropriate and in the best interests of the child.

Respondent asserts the sole issue to be decided is the least restrictive environment for the child during the 2003-2004 school year. It is the school district's position that the appropriate LRE was offered in the child's proposed IEP for that time frame, i.e., a cross-categorical special education kindergarten classroom at Pleasant Valley Elementary School in the Parma City School District.

These issues will be discussed in the following sequence:

1) Burden of Proof

2) Assessment of Program Offered by Proposed 2003-2004 IEP, with particular consideration given to deficiencies alleged by parents,

3) Impact of Expert Medical Testimony provided by Dr. Morris Levinsohn,

4) Petitioners' Entitlement to Relief Requested

Each of the above-delineated issues must be assessed in light of existing federal and state laws enacted for the specific purpose of insuring the provision of education and related services to a special needs child. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq. and its implementing regulations, 34 C.F.R. § 300 et seq. provide such governance at the federal level.

In enacting IDEA, Congress stated at 20 U.S.C. § 1400(c):

> "It is the purpose of this Chapter to assure that all children with disabilities have available to them. . . . a free, appropriate public education

> which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist states and localities to provide for the education of all children with disabilities and to assess and assure the effectiveness of efforts to educate children with disabilities."

This broad-ranging purpose was similarly enunciated by the Ohio legislature in its passage of Ohio Revised Code Chapter 3323 titled "Education of Handicapped Children".

The concept of a free appropriate public education or a "FAPE" as the requisite standard to be met in the education of the disabled, is a concept the judiciary has wrestled with, reviewed, and refined in the more than 25 years that have elapsed since the passage of the predecessor statute to IDEA, i.e., the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. § 1400 et seq., in 1977.

The seminal case in this on-going judicial effort to provide a clear definition of FAPE is Hendrick Hudson Cent. School Distr. Bd. Of Edn. v. Rowley, (1982) 485 U.S. 176. After careful consideration of the language of the Act and its legislative history, the Supreme Court held that a state satisfies the requirements of provision of a "free appropriate public education" when it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction". Id. at 188-189. Further, the court established a two-pronged test to evaluate state compliance with the mandates of IDEA:

1) Has the State complied with the procedures set forth in the Act?

2) Is the individualized education program developed through the Act's procedures, reasonably calculated to enable the child to receive educational benefits?

Procedural violations are violations which result in "loss of educational opportunity" or which seriously infringe on the parents' opportunity to participate in the IEP formulation process" W.G. v. Board of Trustees of Target Range School Dist. No. 23, 960 F.2d 1479, 1484 (9th Cir., 1992). As noted above, however, such violations do not automatically require a finding of denial of FAPE. Rather, the two-pronged test of Rowley is the standard for determination.

Substantive violations require a separate analysis that is predicated on the level of instruction and services provided to the student with disabilities. The Supreme Court concluded that the standard for determination of whether a local education agency's provision of services substantively provided a FAPE involves an assessment of three factors: (1) whether the services were designed to address the student's unique needs, (2) whether the services will provide educational benefit to the student, and (3) whether the services conformed to the IEP. Rowley, 458 U.S. 176 (1982).

The court, in Rowley, also posited that while a state is required to provide a "basic floor of opportunity" to disabled students, it is not required to "maximize the potential of handicapped students" Rowley, 458 U.S. at 189. Rather, the purpose of IDEA was to open the door of education to disabled children. Since the Rowley decision, lower courts have employed a broad range of phrases to characterize the specific level of educational benefit required to be "appropriate". These include: "more than de minimis" Doe, etc. v. Smith, 879 F.2d 1340, at 1341 (6th Cir. 1989); "the educational equivalent of a serviceable Chevrolet" Doe v. Bd. of Educ. of Tullahoma City Schools, 9 F.3d 455 (6th Cir.

1993); "more than trivial" Creamans v. Fairland Local School Dist., 633 N.E.2d 570 (4 Dist. 1993). Given the lack of specificity provided by such phraseology, it appears clear the issue of provision of educational benefit should be judged on an individual basis, in terms of the (1) student's disabling condition; (2) education needs; and (3) program actually offered. Independent School District No. 318, 24 IDELR 1096 (SEA, MN 1996).

It is against the backdrop of these statutes and case law precedent that the issues involving the provision of FAPE to the child must be assessed.

1) Burden of Proof

Respondent's post-hearing brief correctly articulates the position of the Sixth Circuit vis-a-vis burden of proof in due process hearings. The party alleging the denial of a free appropriate public education or challenging the adequacy of an individualized education program bears the burden of proof. Cordrey v. Euckert, 917 F.2d 1460, 1469 (6th Cir. 1990) *cert. denied,* 499 U.S. 938 (1991). The burden of proof to be applied is a preponderance of the evidence. If the party claiming denial of a FAPE or challenging the adequacy of the IEP fails to meet that burden, the party is not entitled to relief. Doe v. Bd. of Educ. of Tullahoma City Schools, 9 F.3d 455, 360-461 (6th Cir. 1993) *cert. denied,* 511 U.S. 1108 (1994); Doe v. Defendant I, 898 F.2d, 1186 1191 (6th Cir. 1990).

In the case at bar, the parent affixed her name to the signature page of the proposed 2003-2004 IEP of the child, and marked in the top margin "06/02/03 Participation Only". The parent marked the consent box at "I give consent to initiate special education and related services specified in this IEP except for LRE" and placed her name on the signature line. Thereafter, as required, the school district completed

Form PS-401 titled "Written Notice to Parents" that indicated:

> "Parent disagreed with offer of 6 hour classroom in public school setting with self-contained special education instruction for kindergarten. Parent wants specialized 'autistic' program out of district."

Form PS-401 was dated June 2, 2003, and signed by Judith Hudgins, Director of Special Education for the School District.

The parents filed a request for due process dated June 2, 2003. The request was time stamped by the school district as received on June 5, 2003. On this basis, it is the petitioners who bear the burden of proof.

Petitioners reference Lascari v. Bd. of Educ., 560 A.2d 1180, 116 N.J. 30 (N.J. 1989) in support of their position that where there exists a history of achievement in another setting, the school district then has the burden to justify the proposed IEP. However, Lascari is not binding precedent in this jurisdiction. As stated in the 1999 case of Dong v. Bd. of Educ. of the Rochester Comm. Schools, 31 IDELR 157 (6th Cir. 1999), despite numerous efforts to distinguish the court's established line of authority with respect to burden of proof, the Sixth Circuit continues to "adhere to the cases holding that the party challenging the terms of an IEP should bear the burden of proving that the placement was not appropriate (citations omitted)".

In a similar vein, Petitioners contend the placement of the child in a special education kindergarten classroom within the Parma City School District constitutes an unauthorized change of placement. The Ohio Model Policies and Procedures for the Education of Children with Disabilities

(2000), at Section 6 IEP/LRE, pages 56-57, addresses the sequencing of children from preschool special education to school-age activities as a "transition process" that requires the convening of an IEP meeting "to determine appropriate school-age special education and related services". The transition process is intended to occur at or before the student reaches compulsory school age. A transition of this nature cannot properly be considered a "change of placement" that could trigger a shift in the burden of proof.

2) Assessment of Program Offered by Proposed 2003-2004 IEP

The IDEA defines "FAPE" as special education and related services that (A) have been provided at public expense, under public supervision and direction and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary or secondary school education in the state involved; and (D) are provided in conformity with an IEP 20 U.S.C. § 1401(8). Special education and related services are identified as those services that will be provided for a child: (1) to advance appropriately toward attaining the annual goals; (2) to be involved and progress in the general curriculum; and (3) to be educated and participate with other children with disabilities and nondisabled children in the general curriculum. 34 C.F.R. §300.347.

Thus, the IEP, as the necessary cornerstone to the provision of FAPE and the document that sets forth the special education and related services offered, comprises a critical factor in the assessment of the program proposed by the Parma City School District. The record contains relatively sparse information regarding the discussions among the team members at the IEP meeting, thus the extent to which the sequential steps in the IEP process as set forth in Ohio Model Policies and Procedures (2000), was carried out

is not clear. However, the IEP as a written statement developed, reviewed and revised in accordance with the requirements of 20 USC 1414(d) speaks for itself. The 2003-2004 IEP represents an offer of services to the child. Once executed by the participants and consented to by the parent, the IEP is a legally binding commitment of resources, and case law precedent requires that all of a child's unique needs arising from his or her disability must be addressed, not simply academic needs Abrahamson v. Hershman, 701 F2d 223 (1 Cir., 1983).

The IEP consists of a detailed written statement arrived at by a multi-disciplinary team, summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive. The IEP must include, among other things, a statement of the child's current level of educational performance, annuals goals for the child, specific educational services to he provided, and the extent to which the child will participate in regular educational programs, pursuant to 34 C.F.R § 300.346. The IDEA imposes numerous procedural safeguards to ensure proper development of the IEP and to protect the rights of parents and guardians to challenge the IEP. 20 U.S.C. §§ 1401(19), 1414(a)(5); Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist., 995 F.2d 1204 (3rd Cir. 1993).

A review of the proposed 2003-2004 IEP offered by the Parma City School District reflects compliance with the prerequisites set forth above, with two primary exceptions: (1) The IEP failed to address "Step 1 "Discuss Vision: Future Planning". Typically, this information is provided by the parent. However, inasmuch as the Ohio Model Policies and Procedures (2002) at Section 6 IEP/LRE, p. 20, specifies that "Vision is not an area subject to due process", it is reasonable to conclude that the absence of this information does not constitute a meaningful violation of the IDEA. (2) Although occupational therapy was identified as a related service, the

IEP failed to specify the frequency, duration and LRE of these services. This violation is considered to be technical rather than substantive in nature for reasons more fully addressed at subsection (D) below.

The annual goals set forth are measurable and are designed to meet the child's needs that result from his disability and to enable the child to progress in the regular curriculum and to receive a free appropriate public education. Further, each goal was accompanied by short-term objectives that included measurable standards capable of being met within the time frame of the IEP. These objectives were sufficiently specific, with the exception of Objective ST2c, which requires the child to "answer 'WH' questions appropriately"; preferred practice would dictate the use of a measurable percentage of numerical goal per number of opportunities, rather than the more subject "appropriately". The goals, objectives and services contained in the child's proposed IEP were based on his progress during the 2002-2003 school year; criteria considered in the IEP development included observation of the child by school district staff, in-person and telephonic communication with Achievement Centers personnel and therapists who worked with the child, review of the child's school-age multifactored evaluation and his various Achievement Center's progress reports, and input from team participants. Overall, the goals and objectives crafted in association with this IEP are reasonably related to the child's educational needs.

While the document is not overly lengthy and does not address academics per se, these are not flaws. A child's IEP is not intended to function as a lesson plan. In fact, federal regulations specifically provide that the IEP is not intended to be a detailed instructional plan, but rather is intended to "(1) set the general direction to be taken by those who will implement the IEP and (2) serve as the basis for developing a detailed instructional plan for the child". As indicated at

Question 56 of Appendix C, the federal IEP requirements can usually be met in a one to three page form. See 34 CFR Part 300, App. C.

During the course of hearing, the petitioners presented several objections to the proposed 2003-2004 IEP. Each of these is considered below:

A) Placement. As previously noted, the parent executed the box on the proposed 2003-2004 IEP consenting to the provision of services except as to the LRE. It is the petitioners' contention that the child's unique needs require placement in a specialized autism program with intensive interventions and supports. On the "Parent Attachment to IEP", a class ratio of "not more than eight students, with one to one 50 per cent of his day" is suggested (School District Exhibit K, p. 147). However, the mother's testimony at hearing in this regard was: "He needed a small ratio. We were thinking one to two children. This [referring to Monarch] is zero children. That is what he ended up with" (Tr. 51). Further, the relief requested in association with this administrative hearing involves maintenance of the child's current private placement at the Monarch School and reimbursement for tuition and transportation expenses incurred in such placement.

Testimony offered regarding placement reveals the parent expressed interest in investigating alternative programs for her child for the 2003-2004 school year, and had, in fact, discussed this option with Dr. Hudgins around February, 2003, prior to the completion of the school-age MFE. In March, 2003, the parent apparently indicated to the child's private speech therapist her desire that the child not attend Parma school, but instead continue his education at Monarch School. At the time the ETR was discussed and executed in May, 2003, there was also brief discussion of the possibility the school district would create a specialized program for

autistic children; however, the implementation of the program was on hold due to a new superintendent coming on board and questions regarding availability of funding. In the interim, the parent was identifying other program options and had contacted Monarch School for literature.

The mother testified the "Parent Attachment to IEP" included in detail everything the parents considered essential to the child's 2003-2004 IEP; she was given an opportunity to discuss these requirements at the June 2, 2003, IEP meeting. The parent prepared this document as a form of "prior written notice" to the school district; she presented it to Dr. Hudgins, the Director of Special Education and an IEP team participant, and requested Dr. Hudgins agree or disagree. Mother stated Dr. Hudgins responded "I'm not going to sign it". Mother then concluded that the team participants were not going to concur with respect to the child's program. She testified: "I just felt we were never going to agree. We just could not agree. We couldn't agree on how much he needed, what he needed, why he needed it".

The parent stands on equal footing with other members of the IEP team, and his or her information and concerns about the child are important considerations in the development of an IEP. The goal of the IEP team is to achieve consensus on the appropriate educational program for the child. Where the team fails to reach consensus, however, it is the school district that is ultimately responsible for ensuring the child has an IEP that constitutes FAPE. (34 CFR Part 300, Appendix C, Question 9 (1998)" as cited in Better IEPs by Bateman & Linden, (3rd Ed. 1998).

In this respect, the parents' focus centered on development of a program with services, supports and interventions to address each developmental delay, physical or emotional shortcoming the parent identified in the child in an effort to maximize the educational benefit accruing to the

child; this statement is supported by testimony elicited at hearing, but one need look no further than the single-spaced 1.5 page document identified as "Parent Addendum to IEP" to reach this conclusion. Is it wrong for parents to want the best for their child? Of course not. It is entirely appropriate for parents to focus on the needs of their child. However, the obligations of the school district extend to a much broader population. With respect to a special needs child, the school district is obligated to provide special education and related services as set forth at 30 C.FR. § 300.347. This obligation includes establishment of services designed to provide an educational benefit to the child in an inclusionary environment, i.e., with disabled and nondisabled students, to the maximum extent appropriate.

The IDEA placement options, from least restrictive to most restrictive, are (1) regular classes (with provision for supplementary services in conjunction with regular class environment; (2) special classes; (3) special schools; (4) home instruction; (5) instruction in hospitals/ institutions, and (6) other appropriate environments. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.551.

Based on observation of the child at the Achievement Centers by Parma City School District personnel, discussions with Achievement Centers staff members, review of documents and progress reports provided by the Achievement Centers, information contained in the child's school-age MFE and discussion among the participants at the meeting, the IEP team members, with the exception of the parent, concluded the child's least restrictive environment for the 2003-2004 school year would consist of a special education kindergarten classroom at Pleasant Valley Elementary School. Specifically, the team concluded the child had made sufficient progress during his two-year stay at the Achievement Centers to possess the strategies and skills necessary to perform in a special education classroom

consisting of six to eight children of varying ages, skills and handicaps. This placement would include lunch, recess, universal school activities such as assemblies, and peer mentoring or reverse mainstreaming opportunities with nondisabled children. Jacqueline Gerber, the child's teacher at the Achievement Centers, stated he would benefit from a school environment with more typical peers, provided the appropriate supports were in place.

The parent, on the other hand, is elated the child, who now attends Monarch School, is effectively being educated in a one-to-one environment that incorporates minimal contact with other children with disabilities and no contact with nondisabled students. Thus, the parent wishes to maintain the child's placement on the continuum of alternative placements described in 34 CFR § 300.551(b)(l) at a special school, which is one step further along the continuum, i.e., more restrictive, than the IEP team's recommendation of special class. Petitioners acknowledge the IDEA contains "strong preferential language for mainstreaming"; however, they seek to circumvent the inclusionary preference incorporated by federal lawmakers by (1) requesting the child's education be continued in a comparable setting to that of the Achievement Centers, and (2) representing that inclusion is not necessary "when the regular classroom provided an unsatisfactory education".

With respect to item (1), it is not necessary to address the issue of whether Monarch School provides a comparable setting to the Achievement Centers. It is sufficient to look to 34 CFR § 300.552(b), which mandates a child's placement be determined at least annually. Further, such placement is to be based on the child's IEP and is to be as close as possible to the child's home. Clearly, the requirement of an annual determination recognizes that a child's needs may change. Indeed, the desire to achieve greater inclusion when possible is implicit within the context of the IDEA and its

implementing regulations. With respect to the 2003-2004 school year, the IEP team participants, with the exception of the parent, perceived the child could derive educational benefit from the provision of special education and related services required by the child's IEP in a special education classroom at Pleasant Valley Elementary School within the child's home school district. The testimony demonstrates the child possesses the appropriate skills to be considered "kindergarten ready".

In similar vein, petitioners' reliance on Beth B. v. Van Clay is misplaced. The reference to the "regular classroom providing an unsatisfactory education" presumably alludes to the child's placement at age 3 in a half-day preschool program within the Parma City School District. Since that time, the school district has funded the child's education at the Achievement Centers for a two-year period, including extended school year services. During that time frame, the child has made great strides toward the Center's enunciated goal of providing instruction to students, who had not been successful in a preschool setting with typically developing peers sufficient, to allow the students to develop the necessary skills to make a successful transition back to their home school setting. In addition, the holding in the Beth B. case merely requires a determination of least restrictive environment for a child to be based upon the setting in which the child receives educational benefit.

The 2003-2004 IEP identifies LRE as a special education classroom and Needed Services as six hours of special education services daily.[1] Extensive testimony was provided at hearing as to the structure of the special education

[1] It should be noted the mother testified the proposed IEP called for one-half day in a special education classroom and one-half day in a regular classroom. The document states otherwise, and no other IEP team member corroborated this testimony.

classroom taught by Mrs. d'Aliberti at Pleasant Valley Elementary School. Mrs. d'Aliberti's classroom was chosen due to the generally higher level of functioning of the children in that setting, in deference to an observation made by Ms. Gerber, the child's lead teacher at the Achievement Centers, that he tended to pick on lower functioning children. The testimony accentuated the similarities between many of the daily routines of the classroom when compared with the child's prior multi-year experience at the Achievement Centers. These similarities were most noticeable in the usage of a morning routine, circle time, hello and good-bye songs, rotation through clearly-delineated activity centers in the classroom, including one-on-one instructional time, play center and book station. Visual picture schedules and prompts were incorporated into the child's IEP to facilitate transitions. Variable motivators and a proactive reinforcement program were addressed. Lunch, recess and assemblies at Pleasant Valley Elementary School would provide opportunities for interaction with nondisabled students. Differences were most noticeable in staff to student ratio, as Mrs. d'Aliberti's class included eight students in the morning and six in the afternoon; and she was supported by two aides. The Achievement Centers' staff-to-student ratios were smaller, as testimony indicated class size to be six, with four adults typically in the room for the full day. It is important to note, however, that instructional, i.e., academic, activities at the work stations in the special education classroom were conducted on a one-to-one basis in both environments.

B) Inadequate Amount of One-to-One Instruction. Plainly, the issue of one-to-one instruction overlaps with the concept of placement. To an extent, therefore, this parental objection has been discussed above. The argument vis-à-vis inadequacy in the amount of 1:1 time provided for direct instruction of the child also roughly parallels the dispute involving the amount of speech language therapy required to

provide the child with educational benefit as discussed at subsection (C) below. Again, there is no evidence that the child needs a set amount of one-on-one instructional time in order to receive a free appropriate public education. While it is in fact a truism that any child would receive educational benefit from significant amounts of one-to-one instruction, the IDEA does not require an ideal education or the best education available for a certain child. Klein Indep. Sch. Dist., 29 IDELR 670, 675 (Texas, 1998). Rather, the standard first enunciated in Bd. of Education v. Rowley, 458 U.S. 176 (1982) remains the touchstone:

> The IDEA does not require that a school either maximize a student's potential or provide the best possible education at public expense. The statute requires that a public school provide sufficient specialized services so that the student benefits from his education. . . . The goal of IDEA is more to open the door of public education to handicapped children on appropriate terms than to guarantee a particular level of education once inside. The main thrust . . . is to provide equal access to education, and no particular educational outcome is guaranteed by the IDEA. Gill v. Columbia 93 Sch. Dist., 31 IDELR 29 (W.D. Mo. 1999) citing Rowley.

Amy Lumadue, the child's mental health therapist from Beech Brook who currently works with the child in a small group setting, noted the child tended to lose focus as additional individuals were introduced into his environment. On cross-examination, however, she stressed the importance of development of socialization skills in very basic terms: ". . . much of life is not a one on one setting; it's a group setting such as this . . . ; classrooms are group settings,

meetings, working at a job; life skills typically occur with a lot of people around you." (Tr. 255).

The petitioners' belief that the child requires more intensive one-on-one instruction than provided in the 2003-2004 IEP does not obligate the school district to comply absent evidence of a specified need. In Dong v. Bd. of Educ. of the Rochester Comty. Schools, 31 IDELR 157 (6th Cir. 1999), the Sixth Circuit upheld a school district's decision to provide 27.5 hours per week of TEACCH-based educational and related services rather than the 40 hour per week program of discrete trial therapy with more one-on-one attention sought by the parents. Because the case arose in Michigan, the applicable standard involved development of an IEP designed to maximize the potential of the child. The SHRO determined both programs would provide the child with FAPE designed to maximize her potential; however, the 27.5 hour program would do so in the least restrictive environment, as it also incorporated small group instruction, mainstreaming and reverse mainstreaming, and opportunities for the child to learn generalization of language and spontaneous communication, independence, and social interaction. The district court held that, taking into account the IDEA's goal of providing services in the LRE, the school district's program was in fact better designed to maximize the child's potential.

The court also noted that the school staff members "were fully qualified to determine if a group or one-on-one setting would be best" and they were not required to accept the recommendation of the parents' expert. Id. at 558.

A similar result was reached in Gill v. Columbia 93 Sch. Dist., 31 IDELR 29 (W.D. Mo. 1999) where a district court found that a school district's proposed IEP, which included 35 hours per week of instruction in a special education classroom and eight to nine hours of one-on-one DTT

provided a FAPE. The parents challenged the IEP and requested 35 hours per week of exclusive one-on-one DTT instruction. While the court determined the parents had shown that the child responded well to one-on-one DTT, that alone was not sufficient. The parents had failed to demonstrate that the school district's proposed IEP was not reasonably calculated to confer an educational benefit to the student. The court questioned the viability of a program that emphasized one-on-one instruction to the detriment of skill development over a broad spectrum of areas; equally critical to the court's decision was the fact that evidence of the child's academic progress and ability to function in the classroom existed. Id. at 129-130. See also La Mesa Spring Valley Sch. Dist., 30 IDELR 191 (CA. 1999), where a hearing officer ruled in favor of a school district's proposed preschool placement that offered a combination of in-home DTT and placement in a preschool day class that provided opportunities for interaction with nondisabled peers. The parents sought placement in an intensive 35-40 hour in-home DTT program based on their expert's opinion that the child required a one-to-one distraction free environment to learn. Id. at 198. Although evidence existed that the student learned in a one-to-one environment, the hearing officer held the school district's proposed IEP to be appropriate because it offered both one-to-one and group instruction giving the student "the opportunity to practice his language skills, develop social skills or generalize all of the skills". Id. at 197. Moreover, participation in a classroom would be a step toward the ultimate goal of integrating the child in school and other activities with regular education peers to the maximum extent possible.

The school district's proposed placement of the child for the 2003-2004 school year involves a special education classroom consisting of six to eight students with a teacher and two aides. One-to-one and small group instruction would be provided throughout the day; in addition, the child

would be exposed to both disabled and nondisabled peers and would be afforded the opportunity to generalize his social and language skills across diverse environments.

The child has demonstrated the ability to succeed in a center-based classroom at the Achievement Centers, where roughly one half of his day was one-on-one instruction. He has also demonstrated the ability to progress when learning in small groups; witness the testimony of Ms. Munici regarding her observation of the child, the testimony of his music therapist, Ms. Alspach who termed him a "peer model" in her music therapy group, and the acknowledgment of Ms. Mandell of March School that he was "doing well" during his small group instruction period. In light of these factors, it is clear the placement of the child in a special education classroom at Pleasant Valley Elementary School is not only appropriate as the least restrictive environment, but is clearly preferable to the parents' choice of Monarch School where the child is instructed in a one-on-one environment for the greater part of the day. This preference provides the child with the breadth of educational opportunities relating to socialization and generalization of skills contemplated by the IDEA and the body of case law that has evolved since its introduction into law.

Finally, no evidence was presented that the child requires a quantifiable amount of one-on-one instruction to progress educationally. As stated above, the child would benefit from opportunities to play with other children, use his developing language skills with others, including nondisabled peers, and to generalize the skills and concepts learned in one-on-one and small group environments. Most importantly, participation in a classroom moves the child one step closer to the ultimate goal of participation with regular education peers in school and other activities to the maximum extent possible.

C) Inadequate Frequency/Duration of Speech Language Therapy. The amount of speech therapy also concerned the parent, as the child received a minimum of 90 minutes of direct services per week at Achievement Centers, while the 2003-2004 IEP called for 60 minutes per week with at least one small group pullout. The recommendation of 60 minutes per week of speech language therapy was made by Ms. Munici, a speech language therapist in the Parma school district, based on her observation of the child at the Achievement Centers, and her discussions with Achievement Centers' staff, including Ms. Gerber, her assistants and the child's speech language pathologist. Further, Ms. Munici considered the 60 minutes per week to be appropriate because speech and communication concepts are embedded in the Pleasant Valley program. This observation was confirmed by Mrs. d'Aliberti who indicated the practice of learned skills in the classroom setting was a common occurrence and was carried out based on regular communication with the therapist.

The Parent Attachment to IEP noted the child has improved his communication skills; however, the parents identify the following speech-language deficits:

> "speech is at 3-4 word utterances . . . anxious with new directions or unfamiliar activity . . . needs daily constant prompts to slow speech, quiet the volume and will require repeating examples to feel comfortable . . . will greet by name and at times confuses the names . . . cannot easily express himself verbally when upset . . . needs to be prompted to use words . . . ."

Both Ms. MacGuire, the child's speech therapist from University Hospitals and Mary Beth Koss, manager of the education department at the Achievement Centers, addressed

the significant gains the child had made in the area of language communication over the past two years; both also stated the child still faces challenges in the development of receptive and expressive language.

In light of the testimony presented, it is uncontroverted the child requires speech language therapy. However, no evidence was presented that the child requires a minimum of 90 minutes of speech language therapy per week in order to receive an educational benefit. Further, one cannot surmise that because the child made progress at the Achievement Centers while receiving 90 minutes or more of speech language therapy per week, a decrease in the amount of weekly speech language therapy would necessarily cause a decline or cessation in the progress achieved. See, e.g., Bd. of Educ. of City Sch. Dist. of the City of N.Y., 34 IDELR 54 (N.Y. 2000) where the court recognized that although a student had made progress in a low student/teacher ratio setting, "it does not follow that she would be unable to make satisfactory progress in a class with a 15-1 ratio" as proposed by the school district.

D) Lack of Specificity regarding Occupational Therapy Services. Although occupational therapy is designated as a special education service to be provided to the student, as delineated in the summary section of the last page of the 2003-2004 IEP, the IEP does not contain annual goals or short-term objectives to be addressed. Instead, the document notes under "Needed Services" (School District Exhibit K, p. 149) the following "OT/Sensory (as part of FBA) assessment to be completed by September 30, 2003)". In addition, the least restrictive environment in which services are to be provided is not enunciated, and the duration of services is not noted.

The present levels of performance in this area are contained on an addendum to the IEP that summarizes the

child's strengths and weaknesses in the areas of fine and gross motor skills. Based on the occupational therapy final summary from the Achievement Centers prepared by the Maria C. Llerena, OT/L, and dated May 6, 2003, the child made significant progress while attending the Achievement Centers (School District Exhibit N, p. 191). The reference to the child's progress is corroborated by the testimony of other witnesses; see, for example, Ms. Beeler's (Parma school psychologist) representation that the child's scores on the Vineland Adaptive Behavior Scales indicated age appropriate motor skills, and Ms McNulty's (UHHS occupational therapist) depiction of kindergarten readiness as "requiring fine motor skills such as cutting and writing your name, the identification of colors, shapes, managing fasteners, and beginning to shoe tie". While Ms. McNulty was reluctant to state the child met this standard due to incomplete progress reports and imperfect recollection, these are skills the Achievement Centers' final summary (and the present levels of performance of the 2003-2004 IEP) identify as generally within the child's capabilities, with the exception of fastening buttons on his person which has not been thoroughly addressed since the child rarely wears clothing with buttons.

The Achievement Centers' final summary relative to occupational therapy concludes with the statement ". . . it is strongly recommended that [the child] continue to receive support from occupational therapy at school as well as other therapies to insure that activities are being adapted to best fit his learning style, address his sensory diet needs and establish modifications in the environment as needed".

Julie Peacock is an occupational therapist employed by the Parma City School District; she is a member of the child's IEP team. Although she has never met the child, she has reviewed all documents related to the provision of occupational therapy services to the child, the Peabody Developmental Scales administered September 30, 2002, and

had conversations with the occupational therapist at the Achievement Centers on two occasions for a total of approximately 30 to 40 minutes regarding the child's IEP goals and progress. In addition, Ms. Peacock discussed the child with the parent, who expressed concern that no sensory goals were incorporated into the prior year's IEP. In light of the fact she (1) had never seen the child, (2) desired to tailor goals specific to the current abilities of the child, (3) wished to take into consideration any potential difficulties the child may encounter based on attending a new school and placement in a foreign environment and (4) desired to identify sensory issues based on personally-obtained data, Ms. Peacock recommended that an occupational therapy assessment be conducted at the start of the school year, as part of an overall functional behavior assessment. The occupational therapy assessment was to include a sensory inventory, assessment of fine motor skills and assessment of visual perception needs utilizing the Visual Motor Integration Test and the Motor Free Visual Perception Test. School was scheduled to commence September 2, 2003. The assessment was to be completed not later than September 30, 2003, with goals and objectives prepared based on the data collected.

Preferred practice would suggest that once occupational therapy is established as a needed service, the creation of goals and objectives should not be deferred. Having said this, however, based on the totality of the circumstances, the determination to defer the development of goals and objectives for the proposed 2003-2004 IEP is considered to be a no more than a technical violation. The specific circumstances considered included:

> (a) the demeanor and credibility of the witness. Julie Peacock was a vibrant woman who exuded pride in her profession and in her ability to perform its duties capably. It was clearly her intent to establish the current levels of performance of the child within

the scope of his new environment at Pleasant Valley Elementary School and to obtain baseline data to create measurable annual goals designed to meet the child's unique needs. Ohio Model Policies and Procedures (2000) at Section 6, "IEP/LRE", Step 4 (p. 24). She also made salient points with respect to certain areas addressed in the occupational therapy objectives of his 2002-2003 IEP. Ms. Peacock stated it was not uncommon for a child of his approximate age or grade level to require assistance with shoe tying and cutting out shapes. She believed these were things he "should be working on, but he shouldn't actually quite know how to do . . . yet". While it would be simple to recycle a goal not yet mastered in the prior IEP and incorporate that goal into the proposed IEP, Ms. Peacock's preference was to address problems that occurred directly as a result of his disability, as opposed to age-related challenges.

(b) the consistency of Ms. Peacock's viewpoint with that contained in the final occupational therapy summary provided by the Achievement Centers, that addresses the need for future services to focus on adaptation of activities to best fit his learning style, sensory diet needs and modifications to the child's environment as needed. Inasmuch as his prior IEP did not incorporate sensory diet needs and his activities and environment would be substantively impacted by his relocation to Pleasant Valley Elementary School, the assessment of the child's abilities and adaptation to his new environment are the most important factors in the creation of appropriate goals and objectives.

(c) the time frame involved in developing appropriate goals and objectives and the need for such services. While it is clear the IEP team determined a

need to provide occupational therapy services, it is equally apparent the child is age appropriate with respect to the majority of the motor skills required for kindergarten readiness as defined by various of the witnesses at hearing and as set forth on the TEACCH checklist. This statement is in no way intended to minimize the necessity for provision of services; his 2003 evaluation team report indicates the child would benefit from additional opportunities to practice fine motor skills and visual perceptual tasks needed for school and self care. It is merely intended to reflect that a diminution of services for an approximate 30-day period in order to complete a comprehensive assessment at the start of the school year should not significantly impact the child's long-term progress in this area. In fact, the overall impact on the child's long-term progress may be greater with the development of goals and objectives based on timely data and tailored to the child's unique needs. Also, Ohio Model Policies and Procedures (2000) at Section 6 "IEP/LRE", Step 5 (p. 27) specify services must start without undue delay; given the circumstances, less than 30 days after the start of school does not seem egregious.

d) the parent's participation in the IEP meeting on June 2, 2003, and her written consent to the initiation of services, except as to LRE.

E) Failure to Provide Music Therapy. Petitioners consider music therapy to be essential to the child's continued success in an educational setting. The Parent Attachment to the 2003-2004 IEP indicates the child

> "loves music and responds in many situations to rhythm. He will march to an area without resistance . . . . [The child] can answer Wh

> questions in music therapy, as well as use 4-5 word appropriate sentences with music. [The child] is greatly motivated with music . . . ."

The Achievement Centers' "Summary of Music Therapy Progress" dated 5-6-2003 corroborates the child's love of music, his responsiveness when music is utilized and his success in answering "wh" questions during the course of music therapy. All children at the Achievement Centers receive 15 minutes of 1:1 instruction in music therapy and 15 minutes consultative services per week; however, music therapy was incorporated into the child's IEP as a related service as a result of anecdotal evidence that indicated the child responded well within the structure of the music setting. On the other hand, testimony elicited from the child's lead teacher, Ms. Gerber, represented she did not teach the child using music. Ms. Gerber stated that while the child responded well to music, the child "still picked up his skills although I did not sing" (Tr. 450). Ms. Gerber described the child's greatest gains during his second year to be in the area of pre-academic skills.

Under the IDEA, related services are defined as "transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education" 20 U.S.C. § 1401(22). The key word in the definition of related services is "required"; if the service is not required to assist a special needs child to derive benefit from special education, a school district is not obligated to incorporate the service into the child's IEP. Neely v. Rutherford County Sch., 60 F.3d 965, 969 (6th Cir. 1995). Music therapy is recognized as an appropriate related service "where the IEP team . . . determines that the particular therapy would be necessary for the child to benefit from special education and to receive FAPE." Letter to Farbman, 34 IDELR 7 (OSEP Apr. 5, 2000). Given the testimony of Ms. Gerber, it cannot be said

that music therapy constitutes an essential related service for the child. The school district is not obligated to provide music therapy unless the IEP team determines it to be necessary for him to receive an educational benefit. Irving Indep. Sch. Sys. v. Tatro, 468 U.S. 883, 894 (1984). In the present instances, the facts do not support such a determination.

Although the school district is not required to provide music therapy, it is obvious the district recognizes that music can enhance the educational experience for some special needs children. Mrs. d'Aliberti testified she had utilized song to reinforce lessons for a student who responded well to rhythm. Also, the classroom structure incorporates the use of music, particularly at circle time. Testimony was also provided regarding the adaptive music class taught by Beverly Miller to special needs students on a twice-weekly basis for a total of 70 minutes. Class sizes are small, and the instructor is assisted by two aides. Ms. Miller is not a musical therapist; however, many of the sequences contained in the course content target skills such as following directions, steady beat or rhythm recognition, acknowledgment of visual contact and socialization including proper greeting and closing. Although each child with a disability has unique needs, the majority of these targeted skills represent areas that could potentially benefit this child.

F) Failure to Incorporate the TEACCH Methodology in the Child's IEP. Although the Achievement Centers staff represents that the school does not advocate a single methodology, but rather utilizes a blend of teaching methods in order to tailor the program to the child, the parent credits the TEACCH methodology for the child's success, particularly in the area of pre-academics where he responded well to the structured nature of the independent work stations and completed assigned tasks regularly, Mrs. d'Aliberti recently attended a two-day workshop on the TEACCH

method; in addition, she had previously discussed the methodology with other teachers trained in its usage and conducted independent research on the Internet. As a result, she was confident the concept of work centers as established in her classroom represented the equivalent of a TEACCH environment. Based on the testimony presented, the structure appears strikingly similar.

Ms. Gerber, the child's lead teacher at the Achievement Centers, stated he needs a structured program that includes high motivators; she acknowledged on cross-examination that the child does not require TEACCH per se. A comparably-structured program would also provide an educational benefit.

A review of the child's school-age MFE, at "Implications for instruction and progress monitoring" included the following statements:

> "Consider continuation of the TEACCH methodology for the child's academic learning.
>
> [The child] focuses more in a structured area that is organized with limited auditory and visual distractions."

"To consider" essentially means "to think about carefully, especially with regard to taking some action". Meriam-Webster's Collegiate Dictionary (10th Ed., 1993). It is not a mandate. In the present instance, however, while the methodology label may not be in use in the special education classroom of Mrs. d'Aliberti at Pleasant Valley Elementary School, the defined structure of the work centers and stations is sufficiently analogous to afford the child the desired benefits.

It is also important to recognize in this context that, as a general rule, methodology disputes are left to the discretion of the school district so long as the chosen methodology provides FAPE. Lachman v. Illinois State Bd. of Educ., 853 F2d 290 (7 Cir), *cert denied* 488 U.S. 925 (1988).

3) Impact of Expert Medical Testimony provided by Dr. Morris Levinsohn.

The testimony of Dr. Morris Levinsohn, the child's pediatric neurologist, formed the linchpin of the petitioners' case in chief. As such, it is sufficiently important to merit a separate discussion. Dr. Levinsohn has had a distinguished career since his graduation from medical school approximately 40 years ago. During the earlier years of his career, i.e., 1975 to 1985, he was involved in a major research project involving a technique of continuous intercranial pressure monitoring that ultimately reduced the national mortality rate from Reyes Syndrome from 90 per cent to 10 per cent. As a result of this success, Dr. Levinsohn traveled extensively worldwide to present the research data at technical seminars (Tr. 307-308).

In 1985, Dr. Levinsohn developed a particular interest in the neurobehavioral disorders of children, including autism spectrum disorder. Over the past 18 years, Dr. Levinsohn estimates he has seen approximately 2000 patients with autism.

Thus, the doctor's credentials are impressive, his breadth of knowledge in the field of pediatric neurology is obvious, and his opinions are delivered with intelligence, wit and charm. In spite of these factors, the testimony elicited with regard to the educational needs of the child in the case at bar is not compelling.

In a letter dated April 2, 2003, Dr. Levinsohn offered his "very strong medical recommendation that [the child] is clearly in need of a very intensive and comprehensive program to include continued speech, occupational, physical and musical therapy." At hearing, Dr. Levinsohn iterated this recommendation and offered his further opinion that the child required one-on-one instruction in order to be successful. Dr. Levinsohn acknowledged these various recommendations with respect to the educational placement of the child and appropriate related services would represent the absolute "best case program" for the child.

On cross-examination, Dr. Levinsohn was queried as to the underlying bases upon which these recommendations were formulated. Dr. Levinsohn indicated he initially met the child in November, 2000. The initial visit was approximately 90 minutes in length and included a physical and neurological examination, an interview with the parents and a concurrent observation of the child during the interview process. There have been three follow up visits ranging in length from 40 to 60 minutes, with the most recent having occurred on April 2, 2003. In addition, Dr. Levinsohn and the child's mother are employed at the same medical facility. During vacation periods, the child is occasionally present at the hospital; and the doctor has had the opportunity to observe the child while engaged in conversation with the parent for average periods of 15 minutes in duration.

The specific recommendations tendered by the doctor with respect to the child's educational program are based solely on information provided by the parents. For example, the doctor has never personally observed the child's reaction to music; rather the parents report the child loves music and it restores some sort of order for him.

Dr. Levinsohn has never observed the child in a classroom setting, nor has he seen the child interact with other children. Dr. Levinsohn acknowledged he is not an educator. He has not reviewed any of the child's educational records, nor has he discussed the child's educational performance with his teachers.

Dr. Levinsohn did not indicate the basis for his recommendation that the child's program incorporate physical therapy. No data have indicated physical therapy to be an essential need of the child.

Plainly stated, the lack of personal knowledge as to the specific needs of the child and the absence of personal observations of the child in an inclusionary educational setting renders the firm medical opinion of Dr. Levinsohn of questionable utility.

Equally interesting and rather surprising is Dr. Levinsohn's recent diagnosis of the child as possessing a disruptive behavior disorder. No new assessments were carried out to establish this diagnosis, no were any such behaviors observed by the physician in his office or on a one-to-one basis with the child. Instead, the diagnosis was predicated on the child's historical profile, information provided by his parents and their "identifying these aggressive behaviors in all domains of functioning in all areas including school and public places".

In light of the willingness of the treating physician to develop a diagnosis on the basis of such subjective data, it is not feasible to attach a high degree of credibility to statements rendered as Dr. Levinsohn's "firm medical opinion". While it is unquestioned that the physician's statements are made with respect to the best interests of the child, as perceived based on the facts provided to him by the parents, the IDEA does not mandate that an IEP team blindly

accept the opinions of outside providers. School districts are merely required to accept information from such professionals and consider that information along with all other data available regarding the needs of the child. Specifically, the IEP team is charged with the responsibility of reviewing all of the data, evaluations, opinions and recommendations placed before them in an attempt to reach a decision by consensus.

In a situation where, as here, the parents' medical expert has never observed the child in a classroom setting and has no substantive personal knowledge to buttress his opinions regarding the appropriate educational programs for the child, the opinions of the educators serving as IEP team members are entitled to be given greater deference than those of Dr. Levinsohn. See e.g., McGovern v. Howard County Pub. Schs., 35 IDELR 153 (Md. 2001). Local educators deserve latitude in determining the individualized education program most appropriate for a disabled child. The IDEA does not deprive these educators of the right to apply their professional judgment. Hartmann v. Loudoun Cty. Bd. of Educ., 118 F.3d 996 at 1001 (6th Cir. 1997).

D. Petitioners' Entitlement to Relief Requested.

Petitioners seek a determination that the proposed 2003-2004 IEP offered by the Parma City School District did not comport with the requirements of the IDEA and, as such, was not designed to confer educational benefit on the child. When a school district has failed to offer a free appropriate public education, the parents may seek reimbursement for their private placement of the child at an alternate facility so long as a determination is made that the public placement violated the IDEA and the private school placement was proper under the Act. School of Burlington, Mass. v. Dept. of Ed. of Mass., 471 U.S. 359, 373-374 (1985).

I do not find that to be the case here. As indicated in Sections B and C above, the IEP proposed by the school district substantially complied with the requirements of the IDEA in that it contained a timely offer of a free appropriate public education of the child prior to enrollment as a school-age child. 34 C.F.R. § 300.403(a). As previously discussed, in order to provide a FAPE, a district is required to offer a student with a disability an individualized program of special education, designed to meet the student's unique needs in accordance with a properly developed IEP. Hendrick-Hudson Dist. Bd. of Educ. v Rowley, 458 U.S. 176 (1982). A school district meets its obligations to provide a FAPE if it has (a) complied with the procedural requirements of the IDEA, and (b) developed an IEP which is reasonably calculated to provide an educational benefit. Id. at 206-207.

Having concluded that a FAPE was offered to the child, it is not necessary to review the program offered at the Monarch School to determine whether it constitutes an appropriate private placement, nor to address the issue of tuition reimbursement.

Respectfully submitted,

/s/ JOY M. FREDA
JOY M. FREDA, S.C. Regis. No. 0024718
Impartial Hearing Officer
6009 Landerhaven Drive, Suite C-1
Cleveland, Ohio 44124-4192
(440) 461-3600

Dated: February 19, 2004

NOTICE OF OPPORTUNITY FOR APPEAL AND RIGHTS FOLLOWING THE HEARING

1. You can request a verbatim transcript of the hearing.

2. **Appeal Rights:** If you are not satisfied with the findings and decision of the impartial hearing officer, you may appeal such a decision to the State Board of Education within forty-five (45) days of notice of the decision to the State Board of Education. If an appeal is filed, the Office for Exceptional Children, on behalf of the Department of Education, will appoint a review officer to review the decision and issue a final order. The address for appeal is:

   State Board of Education
   c/o Office for Exceptional Children
   25 South Front Street, Mail Stop 202
   Columbus, Ohio 43215
   (614) 466-2650

3. **Appeal Rights after a State Level Review:** If you are not satisfied with the final order of the state level review officer, you may appeal such order within forty-five (45) days of receipt of notice of the order to:

   the Court of Common Pleas of the county in which the child's school district of residence is located, under Chapter 119 of the Ohio Revised Code;

   OR

   You may file an appeal with the federal district court of competent jurisdiction.

/s/ JOY M. FREDA
JOY M. FREDA
Impartial Hearing Officer

[CERTIFICATE OF SERVICE OMITTED]

STATE OF OHIO
DEPARTMENT OF EDUCATION
OFFICE FOR EXCEPTIONAL CHILDREN

Case No. SE 1328-2003

IN THE MATTER OF

JACOB WINKELMAN, STUDENT

PETITIONER/APPELLANT,

-AND-

PARMA CITY SCHOOL DISTRICT

RESPONDENT/APPELLEE

THERESA L. HAGEN, ESQ.
STATE LEVEL REVIEW OFFICER

DECISION

Counsel for Jeff and Sandee Winkelman, parents of student Jacob Winkelman, timely brought this appeal to challenge the February 25, 2004 IHO decision which determined that the Parma School District has not failed to provide Jacob with a free appropriate public education ("FAPE") and that, under IDEA, the appropriate placement and least restrictive environment ("LRE") for Jacob for the 2003-2004 school year is Pleasant Valley Elementary School

as proposed by the IEP team on May 5, 2003. See, IHO Decision at 31, ¶ N.

This due process action began on June 5, 2003 after the parents and school district failed to agree on the Kindergarten placement for Jacob's 2003-2004 IEP. Bd. Ex. A, See, also, Bd., Ex. K.

I. Background

Jacob first received services from Parma School District at age three for preschool during the 2000-2001 school year pursuant to an MFE on September 1, 2000 which identified Jacob as autistic. Bd. Ex. B. When Jacob did not respond well to the Parma School District preschool program, after attending first, the morning program, then the afternoon program, the parents and school authorities agreed to place Jacob at the Achievement Centers-East starting in July 2001, at the Parma School District's expense. IHO Decision at 7, ¶¶ 19, 22. Thus, the IEPs developed for the 2001-2002 and 2002-2003 identified the Achievement Center as the LRE placement, specifying under "Reason for Placement in Separate Facility" that the child needed "specialized supports for behavior and academics that aren't available in a public school setting." IHO Decision at 8, ¶ 27; See, Bd. Ex. I, J.

Both the parents and school district were satisfied with Jacob's educational progress at the Achievement Center and agreed that Jacob was ready to attend Kindergarten in the 2003-2004 school year. Bd. Ex. C (MFE, May 6, 2003: School Age Planning and Reevaluation (school-age MFE) and Parental Consent Form). See, also, IHO Decision at 8, ¶ 28; School District Brief at 2.

After the school district completed the school-age MFE, the IEP team met on June 2, 2003 and offered Jacob a full-day Kindergarten placement at Pleasant Valley Elementary

School with six hours per day of instruction, in the small, special education classroom and opportunities to later transition him into the regular kindergarten classroom as appropriate. Bd. Ex. C; Ex. K (IEP, June 2, 2003); IHO Decision at 10, ¶ 32. In addition, the IEP team recommended sixty minutes of speech therapy as well as occupational therapy, the amount of which would be determined in September 2004 along with the functional behavior assessment (FBA); also, Jacob would participate in adaptive music classes but not music therapy at Pleasant Valley. School District Brief at 4; Bd. Ex. K. At the Achievement Center, Jacob had been receiving sixty minutes of speech therapy and sixty minutes of occupational therapy, plus thirty minutes of both speech and occupational group therapy, and 15 minutes of music therapy. IHO Decision at 8, ¶ 24.

Jacob's mother participated in the June 2, 2003 IEP meeting along with Jacob's teacher at the Achievement Center and several school district personnel including the district's speech and occupational therapists, a mental health therapist, the district's Special Education Director and two district special education teachers. See, IHO Decision at 10, ¶ 33; Parents Brief at 4; Bd. Ex. K. All participants signed the 2003-2004 IEP including Jacob's mother although she checked the box indicating that "[she gave] consent to initiate special education and related services specified in this IEP except for LRE." Bd. Ex. K.

In addition, a page and a half document prepared by Jacob's parents was attached to the IEP outlining their own perceptions about Jacob's needs and goals, concluding that Jacob "needs to continue in a specialized program." Id., Parent's Attachment to IEP; School District Brief at 4. At the hearing, Jacob's mother testified that this IEP attachment was prepared as a prior written notice to the school district of the parents' intent to seek a private placement for Jacob at the district's expense. IHO Decision at 10, ¶ 33. Also, she

testified that she had told the Director of Special Education as early as February 2003 that she was investigating private placement options for Jacob's kindergarten and continued school age education. Id. at ¶ 38.

The school district provided the required "Written Notice to Parents" dated June 2, 2003 informing the parents of the district's decision to place Jacob at Pleasant Valley Elementary School. Bd. Ex. P. The form noted that, "parent disagreed with offer of 6-hour classroom in public school setting with self-contained special education instruction for kindergarten. Parent wants specialized autistic program out of district." Id. Subsequent to the failure to agree on the LRE placement at the IEP team meeting, the parents filed the due process request on June 5, 2003. IHO Exhibit 2.

Jacob's parents, believing that Jacob would not be able to achieve educational progress at the public school, unilaterally enrolled Jacob in the Monarch School starting in September 2003.[1] School District Brief at 5, citing Tr. 216 (Mandell); Parent Ex. 6. The Monarch School's enrollment includes only children with a diagnosis on the autistic spectrum; the curriculum provides no interaction with other, non-autistic, typically developing peers and all incoming students start with one-on-one instruction. See, IHO Decision at 12, ¶ 44, 45, citing Tr. 200-208 (Mandell).

Prior to the hearing, the parties each submitted a Statement of the Issues to be resolved by due process. IHO Ex. 16, 19, 26. The parents first proposed three questions:

---

[1] The parents asserted that the Monarch School was "an extension of the Achievement Center." Statement of Written Issues by Petitioners, October 14, 2003. No evidence was presented to support any connection between the Achievement Center and the Monarch School other than both schools were private rather than public schools.

1. Does a school district have the right to change a child's placement after an agreed placement in an alternate setting produced outstanding educational gains?

2. Do the opinions of independent experts, noting the educational gains of the involved child and the necessity of that continues placement, establish the need to continue that same placement?

3. Does the least restrictive environment designation of a public school take precedence over significant educational gains established in an alternate setting, when that setting was agreed to by the public school and recommended by unbiased experts?

Each of these issues will be fully explored in Due Process. IHO Ex. 19 (October 10, 2003). These issues were reframed in a Memorandum to IHO Freda:

a) The child should continue his education at Monarch School—an extension of the Achievement Center. The Achievement Center was a placement for the child that Parma Schools supported and helped fund. Although IDEA contains strong preferential language for mainstreaming, the 7th Circuit Court decided that mainstreaming was not appropriate when the regular classroom provided an unsatisfactory education. *Beth B. v. Van Clay,* 282 F.3d 493 (7th Cir. 2002)

b) It is well established under IDEA that the school district must provide notice of a change of placement. If the parents wish to contest the change of placement, they may file a due process complaint. The parents in this case believe this is an unauthorized change of placement of which they do

not approve. The parents have filed due process as their right.

c) When a more restrictive program has been shown to be successful, the burden of justifying a new IEP, including placement, shifts to the school district. *Board of Educ. Of the County of Kanawha v. Michael. M.*, 95 F. supp. 2d 600 (S.D. W.Va. 2000). The parents believe that the previous IEP, set at the Achievement Center and Monarch School has been very successful. This success, as well as a previous negative history of Jacob at Parma schools, establishes that the current placement at Monarch is appropriate and in the best interests of Jacob.

IHO Ex. 26 (October 14, 2003).

On the other hand, Parma City Schools, believing that the Pleasant Valley Elementary School could provide a FAPE for Jacob and, perhaps more importantly, believing that the public school was the least restrictive environment ("LRE") and most inclusive program for Jacob, did not think Jacob's needs required that he be placed in a private, specialized environment and would not agree to pay for Jacob's education at the private school. IHO Ex.16 (School District Statement of Issues, Oct 7, 2003). The School District submitted that the sole disputed issue was: "Whether Jacob Winkelman's least restrictive environment is a special education resource room at Pleasant Valley Elementary School or the Monarch School," IHO Ex. 16.

The issue for resolution at the hearing, then, was whether the Parma City School District could provide a FAPE for Jacob at the public school, Pleasant Valley Elementary School.

After four days of hearing (October 16, 17, 27, November 6, 2003), IHO Freda issued a Decision agreeing with the Parma City School District that Jacob's needs did not require a private, segregated placement at the Monarch School and that Jacob could be provided FAPE in the public school environment at Pleasant Valley Elementary School with sufficient support services to provide Jacob with an educational benefit in the least restrictive environment. IHO Decision at 32 (§ "Decision"), February 20, 2004. In this appeal, the parents challenge IHO Freda's Decision that the Parma School District can provide a FAPE to Jacob.

II. SLRO Standard of Review

Upon reviewing the case, the SLRO employs a *de novo* or independent examination of the evidence from the hearing, with deference is given to the IHO for credibility judgments and hearing procedures. See, 34 C.F.R. §300.510(b); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 621 (6th Cir., 1990). Accordingly, the issues as outlined by the Parents in their Appellate Brief ("Parents' Brief) are reviewed as whether, in reaching her decision, IHO Freda's conclusions were well supported in law and fact, *de novo*; and, whether, IHO Freda acted without bias or abuse of discretion in determining witness credibility or resolving evidentiary conflicts and that such discretionary decisions were not clearly erroneous.

Further, on appeal before the state level review officer ("SLRO"), there is no presumption of error in the IHO decision and, as such, the "appealing party bears the burden of raising claims of error and *demonstrating* that such errors were committed." *In Re Student with a Disability*, 30 IDELR 408, 410 (1998) (emphasis added); see, also, *Lyons by Alexander v. Smith*, 829 F. Supp. 414, 417 (D.D.C. 1993) (burden is on the party challenging an IHO determination to

persuade the reviewing court that the IHO was incorrect); *accord, Dong,* 31 IDELR at 157; *Cordray*, 917 F.2d at 1469.

As argued by the school district, it is agreed that the Parent's arguments as presented in their Brief are unsupported and unsubstantiated, without references to evidence or legal authority, and contrary to their burden on appeal.[2] School District Brief at 1. Nonetheless, each issue raised in the parents' brief will be treated as an assignment of error and given appropriate consideration within the applicable standard and scope of this review of IHO Freda's Final Decision.

Thus, the issues as raised by the parents' brief are that procedurally, IHO Freda acted improperly when she employed an assistant who attended the due process hearings and when she allowed for excessive time delays that cause

---

[2] In telephone conferences to each party's counsel on March 20, 2004, counsel for both the Parents and the school district sought the opportunity to submit legal briefs on the issues on appeal. A scheduling Order was prepared with the Parent Appellant's brief due on April 15, 2004 and the School District's Appellee brief due on May 7, 2004. Extension of Time and Scheduling Order, March 20, 2004. Unfortunately, while the Parents identified certain issues in their Appellate Brief, they offered little to no legal support (except two inapplicable cases contrary to the law of this jurisdiction) or evidentiary references for their arguments as proof to consider in making this decision as required by law. *Id.* at ¶ 1, (reminding parties that citations to the record and law are required); See, also, School District Brief at 1. While the Appellant Brief, then, is more a recitation of complaints and a general disagreement with the public placement by the parents, under the spirit of IDEA, the parents should be allowed the benefit of the process of appealing the IHO Decision, even though they are represented by counsel. Thus, while this appeal could be summarily dismissed as failing to meet the burden of proving and persuading that certain errors were committed and contrary to law, nonetheless, the asserted errors are each being considered as an assignment of error in the order presented in the Parents' Appellate brief and the proceedings reviewed *de novo* where appropriate.

harm to the parents, and that substantively, IHO Freda erred when she assigned the burden of proof to the parents, found that the LRE was the key issue to be resolved at the hearing, decided that a smaller class size was not a "critical element" for Jacob's education, minimized the importance of the TEACCH methodology, and when she disregarded the parents' expert witness's testimony. Each of these issues will be considered as the parents' assignments of error for which the parents bear the burden of proof and persuasion.

III. Procedural Errors

In this Appeal, the parents assert two improper procedural decisions and actions by IHO Freda. First, the parents complain that because the "IHO [is] the sole person entitled to hear and decide this due process case," IHO Freda improperly employed an assistant whose "presence infected the process." See, Appeal Brief at 2. Secondly, the parents complain that, "the time delay for the decision was unconscionable." Id. The parents, as the complaining party, bear the burden of proving and persuading that IHO Freda's procedural decisions were clearly erroneous and contrary to law.

Further, because the IHO had the discretion to make the procedural determinations complained of by the parents, then the review standard is whether IHO Freda abused her discretion or committed clear error when making these judgments. Thus, the procedural issues to reviewed in this appeal are whether IHO Freda acted without bias, abuse of discretion, or clear error when she employed an assistant and when she granted extensions of time.

A. IHO Freda's Assistant

Parents complain that, because under IDEA and Ohio law an IHO is the "sole person to hear and decide" due process

disputes, then an IHO may not employ any additional individuals to assist the IHO in the due process hearing. See, Parents' Appeal Brief at 2. The parents do not complain that the IHO could have employed assistance outside the hearing; rather the complaint is limited to the fact that an assistant attended the "actual hearing [and] took notes, performed research and generally participated in the hearing." Id.

While parents' counsel argues that the assistant's "unauthorized participation was a violation of established procedure," the brief is completely void of any references to law that would support the notion that an IHO is prohibited from including an assistant or law clerk or any other employee to aid in the hearing process. Id. To the contrary, as pointed out by the school district, the use of a law clerk or research assistance is common practice in both the state and federal courtrooms. School District Brief at 7, fn 25.

Furthermore, the argument that "the 'assistant' was never agreed to by the Petitioners (nor the Respondents) and her involvement was never sanctioned by either party" is contrary to the record. Parents' Brief at 2; See, School District's Brief at 6; Peer Aff. at ¶ 5; IHO Ex. 20 (Disclosure Conference Memorandum, October 10, 2003: "Also present was Ann Oakar, attorney, as an invitee of the hearing officer, after consent of both parties."). In fact, the parents did not object to the presence of the assistant when IHO Freda asked if there were any procedural objections at the start of the hearing. See, School District's Brief at 6, citing Tr. 14 (IHO Freda). Thus, there was nothing inappropriate or prohibited by including an assistant to the IHO in the hearings.

In addition, if and when procedural violations are found to have occurred in a due process action, the violation must be shown to have adversely affected the student's educational progress. See, *Bd. Of Educ. Of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 76, 207 (1982). In their brief, the parents simply state that the "presence [of the assistant] infected the process." Parents' Brief at 2. While "infected" certainly implies something negative, there is nothing further in the brief as to how, when, or why the assistant's presence was "infecting" the process. Without any evidence from the parents as to the negative effect that the assistant had on Jacob's educational progress, the argument completely fails as a matter of law.

Thus, the assignment of error suggesting that IHO Freda violated IDEA procedures in allowing an assistant to attend the hearings is not well taken. Accordingly, it is found that IHO Freda did not violate the IDEA and Ohio due process procedures by employing an assistant.

B. Time Delay

The parents also complain, procedurally, that the "time delay for the decision was unconscionable." Parents' Brief at 2. In support of their argument, parents point out that the "decision took an unbelievable 107 days" and the entire "case took 262 days to decide or more than five and a half times the length of the guidelines." Id. at 2-3.

Albeit unfortunate that the due process action took nearly nine months (June 5, 2003-February 20, 2004) to complete and resolve, there is nothing in the record of the case to suggest any unnecessary or improper delays. IHO Ex. 1 (Parent's letter requesting due process, June 5, 2003); IHO Decision (February 20, 2004). All time extensions were appropriate given the parties' issues and schedules; indeed, the first time extension, filed on June 24, 2003, was a 45-day

request from *the parents* in order to obtain counsel. IHO Ex. 5, June 7, 2003. IHO Freda granted the request, but extended the final decision due date only thirty days, from July 20, 2003 to August 20, 2003 which actually would have resulted in a final decision before the new school year started. IHO Ex. 6, Extension of Time Order, July 2, 2004.

The second extension of time was a *joint request*, agreed to by both the parties, in order to accommodate the pre-hearing and hearing schedules. IHO Ex. 10, Second Extension of Time, August 20, 2004; IHO Ex. 8, Scheduling Order (August 12, 2003). Thus, the first five months (approximately 150 of the 262-day timeline calculated by the parents) were spent in pre-hearing activities at the request of the parties, including time to obtain counsel for parents, for parties to brief and resolve a stay-put placement dispute, and for all due process hearing scheduling, preparations, and completion. See, e.g., IHO Ex. 8, Scheduling Order, August 12, 2004; IHO Ex. 11, Parma School District Brief in support of Stay Put at Pleasant Valley Elementary School; IHO Ex. 12, Parents' Brief Re: Stay Put (August 28, 2004). After the final day of the hearing on November 5, 2003, another month was allowed for the parties to submit post-hearing motions and briefs. See, e.g., IHO Ex. 29, 30 (Motion to Strike and Reply); Post-Hearing Briefs. The time delays in the first six months, then, were neither caused by or for the benefit of the IHO, but rather to appropriately accommodate the parties' interests and schedules without bias or abuse of discretion.

Finally, the last three extensions of time (January 5th, January 12th and February 19th) were required to allow the time necessary for the IHO to thoroughly and thoughtfully consider the record, including the entire transcript and documents, conduct research, and review all other evidence offered by both parties in order to complete the final decision. IHO Ex. 31, Extensions of Time. Considering the volumes of materials in the case record along with the

number of witnesses and length of the transcript, the time extensions do not demonstrate an abuse of discretion on the part of IHO Freda. In addition, as pointed out by the school district, parents did not object to these extensions of time. School District Brief at 8. Thus, the appellants' complaint about excessive time delays is not well-taken and not found to be supported in the record.

Ultimately, while procedural errors can be found to be either significant or *de minimus*, they must be presented and proved by the injured party *as it relates to the child's education. Rowley*, 458 U.S. at 207 (emphasis added) ("reasonably calculated to enable the child to receive educational benefits").

The parents have not complained of any consequences to Jacob's education; to the contrary, they argue that the harm caused by the procedural delay "caused positive harm to the parents." Parents' Brief at 5. Of course, as the school district notes, the positive harm to the parents was financial, a risk they assumed with the unilateral enrollment of Jacob in the Monarch School. School District Brief at 8, fn 27 ("[h]ad Petitioners complied with the stay-put order, Jacob would have attended the Achievement Center, at the District's expense, during the pendency of the due process hearing.").[3]

---

[3] Parents did not assert any error regarding the IHO stay-put decision; thus any stay-put issues are outside of the scope of this appeal. Nonetheless, it is noted that had the parents complied with the stay-put order, Jacob was to have attended the Achievement Center. IHO Ex. 13, Interim Order-Stay Put (August 28, 2003). Although a stay-put issue was not raised or briefed, and thus, not adequately reviewed on appeal, it seems that even though the Achievement Center was the "then-current placement" for Jacob when the due process complaint was filed in June 2003, because the Achievement Center does not serve six-year-olds, and Jacob had completed the preschool curriculum, been reevaluated under IDEA for a school age MFE, and was ready for kindergarten, then the Achievement Center might not have been an appropriate stay-put

IV. Substantive Errors

Upon reviewing the substantive issues of the case, the SLRO must give deference to the IHO for credibility judgments and evidentiary resolutions but employ a *de novo* review of the IHO's statutory interpretation and legal rulings. 34 C.F.R. § 300.510(b); *Thomas*, 918 F.2d at 621. Thus, a determination of whether an eligible child has been provided FAPE pursuant to an appropriate IEP, including the LRE placement and related services, is a mixed question of law and fact, reviewed *de novo* on appeal. *Thomas*, 918 F.2d at 621. On the other hand, when the IHO has the discretion to make certain determinations complained of by the parents, including witness credibility and judging the sufficiency and weight of the evidence, the review standard is to give deference to the IHO unless it can be demonstrated, by the party raising the issue on appeal, that such judgments were clearly erroneous. *Id.*

The parents asserted five assignments of error as substantive violations of IDEA, arguing that the IHO erred when she: A. assigned the burden of proof to the parents; B. found that the least restrictive environment ("LRE") placement was the key issue to be determined through due process; C. decided that a smaller class size was not a critical element; D. minimized the importance of the TEACCH methodology; and, E. disregarded parents' expert witness, Dr. Levinsohn's, testimony.

---

placement for Jacob for the Fall, 2003. Thus, contrary to the school district's argument, it is questionable whether parents could have complied with the stay-put order. Nonetheless, the parents still bear the burden of proving that the school district cannot provide FAPE at the proposed placement at Pleasant Valley.

A. Burden of Proof

Parents complain that the "IHO erred when she incorrectly ignored the burden of proof responsibility on the part of the school for a change in an IEP." See, Parents' Brief at 3, ¶ 1. Because the question of whether the IHO applied the correct legal standard of proof is a question of law, the error asserting an incorrect assignment of the burden of proof is reviewed *de novo* on appeal. *Thomas*, 914 F.2d at 621.

In support of the argument that the burden of proof should have been assigned to the school district, parents cite to two cases outside of this jurisdiction: *Board of Education of the County of Kanawha v. Michael M.*, 95 F. Supp. 2d 600 (S.D., W. Va., 2000) and *Lascani v. Board of Education*, 560 A.2d 1180 (N.J. 1989). In *Michael M.*, the court found that when a child is currently enrolled in a more restrictive program, the school district must prove that the child's placement can change to a less restrictive program. *Michael M.*, 95 F. Supp. at 608. Likewise, *Lascani* found that once a child has shown a "history of achievement" in a particular placement, then the school district must prove that a change in placement would be appropriate for the child. *Lascani*, 560 A.2d at 1194.

Michael M. and *Lascani*, however, can offer no help for the parents' argument that the school must bear the burden of proof in this case. While both the West Virginia district court and the New Jersey state court have followed the jurisdictions that find that the burden of proof should be shouldered by the school district to prove that FAPE has been provided to a student, Ohio must follow the 6th Circuit's settled decisions that the burden of proof rests with the party challenging the IEP. See, *Dong*, 31 IDELR at 57; *Cordray*, 917 F.2d at 1469.

As pointed out by the school district in their brief, there is a distinct split among the federal circuits as to which party bears the burden of proof in IDEA due process actions. School District Brief at 9, fn 30. ("The Second, Third, Eighth, and Ninth Circuits place the burden of proof on the school district in all instances. The Fifth, Sixth, and Tenth Circuits place the burden of proof on the party challenging the IEP.") Indeed, this split of authority is noted in the *Michael M.* case, one of the two cases relied upon by the parents. See, *Michael M.*, 95 F. Supp. 2d at 608.

As the school district explained in their brief, regardless of the particular issue in dispute, the district court in *Michael M.* adopted the reasoning from the New Jersey state court, that the school district should always bear the burden of proof because the school district has the legal obligation under IDEA to provide a FAPE and because the school district is in a better position to meet the burden of proof. School District Brief at 8, fn 29, citing *Lascari*, 116 N.J. at 44-45; *Michael M.*, 95 F. Supp. at 608; (New Jersey is in the federal jurisdiction of the Third District, which assigns the burden of proof to the school district). Indeed, the 6th Circuit has expressly rejected opportunities to adopt similar arguments and shift the burden of proof to the school district, unless the school district is the party challenging the IEP. *Dong*, 31 IDELR at 157.

The parents simply cannot rely upon West Virginia and New Jersey burden of proof case law that is directly contrary to our own jurisdiction's well-settled burden of proof standard that the IEP challenger must bear the burden of proving that the placement is not appropriate under IDEA.

In fact, notwithstanding the fact that in the 6th Circuit the burden of proof clearly rests with the parents who are challenging the IEP, even assuming *arguendo* that the school district *did* have the burden of proof; the lengthy record

flavoring the proposed kindergarten placement for Jacob certainly and sufficiently would carry the burden to prove that the school district could provide FARE for Jacob at the Pleasant Valley Elementary School. IHO Decision at 30, ¶¶ E, F; at 32 (§ "Decision").

Thus, the parents' assignment of error alleging improperly placing the burden of proof on the parents is not well-taken and contrary to the settled law of the 6th Circuit. The IHO properly relied upon *Dong* as the law of this jurisdiction and, accordingly, the decision that the burden of proof rests with the parents who challenged the IEP is affirmed.[4]

B. Least Restrict Environment ("LRE")

The parents next complained that the "IHO erred when she stated that the LRE was the key issue in the due process and not the question of appropriate services offered in the IEP." Parents' Appeal Brief at 4, ¶ 2. On appeal, the issue as to *whether* the IHO properly considered evidence is an issue of law under IDEA that is reviewed *de novo*, while the issues regarding the sufficiency and weight of the evidence are given deference to the IHO. *Thomas*, 914 F.2d at 621.

Thus, IHO Freda's decision is reviewed *de novo*, with an independent review of the record, to determine whether she considered all the appropriate evidence, including evidence regarding both the LRE and the related services needed by

---

[4] In addition, the IHO decision that the parents did not carry their burden of proof that Jacob could not be provided FAPE at the public kindergarten proposed by the school district is affirmed. See, IHO Decision at 30, ¶ E; 32. The parents' argument, however, thus the assignment of error and scope of this review, rested solely on the point that the IHO reversibly erred in relying upon *Dong* and not applying *Michael M.* and *Luscani* to determine the burden of proof. Parents' Brief at 4.

Jacob to succeed educationally, when she concluded that the Parma City Schools could provide a FAPE to Jacob. If, in fact, IHO Freda properly considered all of the evidence, then her evidentiary conclusions regarding whether the school district could provide FAPE are given deference on review and reversed only if clearly erroneous.

The parents' argument focuses on asserting that IHO Freda improperly considered LRE as the key issue to be decided in this case. Indeed, throughout the entire dispute, from the IEP meeting before due process was filed, during the stay put argument, in pretrial issue statements, and post trial briefs, and including the entire relief requested in this appeal, the parents repeatedly emphasized in their arguments simply that Jacob should be placed at the Monarch School at the school district's expense. See, IHO Ex. 1 (Parents' Letter requesting due process: "only possible resolution is to place Jacob in a specialized autism program"); Ex. 4 (ODOE Form: Parents' Request for Due Process); Ex.12 (Parents' Brief Re: Stay Put Provision); IHO Ex. 19, 26 (Parents' Statements of Issues); IHO Ex. 30 (Parents' Response to Motion to Strike); see also, School District Brief at 9 citing IHO Decision at pp.2, 32, 54 (that the Parents unilaterally enrolled the child in the Monarch School and now seek reimbursement from the district "further suggest that the essential dispute in this matter is the LRE placement."); Bd. Ex. K (parent signed "I consent to all services *except* LRE"); Parents' Brief at 9 (relief requested).

With the multiple documents and pages of testimony focused on parents' request for Jacob's placement at the Monarch School, particularly considering that the parents' *sole* complaint at the IEP meeting was the LRE, the parents simply cannot now be heard to complain that IHO Freda incorrectly considered the choice of placement (LRE) as the central issue of this dispute. Nevertheless, the issue remains as to whether IHO Freda adequately and appropriately

considered all the evidence in determining that the school district's proposed IEP, including both the LRE and the related services, could provide FAPE to Jacob.

To further complicate this issue, however, parents completely misrepresent the nature of the school district's decision to offer Jacob FAPE at the public elementary school as a *change* in placement. Parents' Brief at 5; IHO Ex. 26 (Memorandum Re: Parents' Issues); See, also, IHO Ex. 19 (b) (Parents' Statement of Issues: "It is well established under IDEA that school district must provide notice of a change in placement. If parents wish to contest change in placement, they may file a due process complaint. Parents in this case believe this is an unauthorized change of placement to which they do not approve."); Ex. 19 (a) ("Parents state that the child should continue his education at Monarch School – an extension of the Achievement Center.")

Jacob had completed the preschool curriculum at the Achievement Center; necessarily, and as agreed by the parties, it was time for Jacob to leave the Achievement Center and move ahead to the next educational level, kindergarten. See, also, Aff. of J. Hudgins; School District Stay-Put Brief ("because Jacob has turned six year old and he is a school-age child, he cannot attend the Achievement Center preschool."). Therefore, the disagreement at the June 2, 2003 IEP meeting was not about *whether* Jacob's educational placement would "change" from the Achievement Center; rather, the disagreement was whether that change would be to place Jacob at the public school (Pleasant Valley) or at a new private school (Monarch School). See, e.g., Ex. K (proposed 2003-2004 IEP); IHO Ex. 1 (due process request).

As pointed out by IHO Freda and as found in a *de novo* review of the record, absolutely nothing in the records, either documents or testimony, support the notion that the Monarch

School is simply a continuation of the Achievement Center program. See, IHO Decision at 28, ¶ 137. Even if it was, there is still a significant change in Jacob's education between preschool and kindergarten; indeed, a school age MFE must be conducted to update the preschool MFE—that is, each child must be reevaluated once the child is school-age. See, Ohio Model Policies and Procedures for the Education of Children with Disabilities (2000) at § 6, IEP/LRE, at 56-57, "transition process" from preschool to school age); IHO Decision at 36. Certainly, parents don't suggest that Jacob should continue to be served under the preschool MFE; likewise, parents aren't suggesting that Jacob should stay in preschool. Thus, all parties agree that Jacob is ready to *change placements* from preschool to a school-age environment, starting with kindergarten. See, IHO Ex. 19, 26 (Parents' Statement of Issues); IHO Ex. 16 (School District Statement of Issues).

So, because Jacob's school placement must necessarily change after preschool, parents' argument that the school district was trying to improperly change Jacob is completely without merit. Again, as determined by IHO Freda, and agreed to by the parties *at the time of the hearing*, the central dispute arising from the June 3, 2003 IEP meeting was, in fact, *where* Jacob would continue his education after preschool.

The overall flaw in parents' logic seems to rest in the fact that because Parma City Schools could not serve Jacob in the public preschool when Jacob was three, then Parma City School will not be able to serve Jacob in the public kindergarten and elementary school now that he's six. Of course, there is nothing in the record to support such a speculative conclusion; to the contrary, there is voluminous evidence to support the school district's position that they can and should serve Jacob's needs as a school age student and that Jacob would be successful in a public, kindergarten

environment with related services support. See, e.g., testimony of J. Alspach (Tr 153-54); K. Foley (Tr. 356-59), J. Gerber (Tr. 463-64); J. Hudgins (Tr. 667-68); M. Munici (Tr. 271-73); Y. Newlin (Tr. 605); S. Rueger (Tr. 363), K. Tomko (Tr. 485): in a *de novo* review of the record, the witnesses agreed that Jacob was academically ready for the kindergarten curriculum and socially ready for a more inclusive environment, specifically the special education kindergarten program at Pleasant Valley Elementary School, IHO Decision at 12, ¶ 47 citing Tr. 199 (Mandell, Director, Monarch School, who acknowledged that Jacob could have some educational success in settings other than one-to-one, specifically in a classroom with five-seven children; "he would learn but would learn less.")

Actually, completely contrary to the parents' assertion that the IHO considered the LRE in exclusion of considering the specialized services needed by Jacob, IHO Freda painstakingly dissected each service element of each of Jacob's past, current, and proposed programs: at the Achievement Center preschool, in Ms. D'Aliberti's kindergarten classroom at Pleasant Valley, and the Monarch School program. See, IHO Decision at ¶¶ 27-28, 65-66, 99, 133-136 (Re: Achievement Center); ¶¶ 105-109, 112, 123-127 (Re: Pleasant Valley); ¶¶ 40-47, 11-116, 138-142 (Re: Monarch School); School District Brief at 10, citing IHO Decision at 30-33, 36-51 (pointing out the thoroughness with which IHO Freda examined each service offer to Jacob).

In fact, after reviewing the specifics of all three programs, *de novo*, they all compared similarly in structure, focus, and educational philosophy, with the Monarch School the most restrictive environment employing almost all one-to-one instruction and very little group or peer interactions, the Pleasant Valley classroom the most inclusive environment, employing both one-to-one and small group instruction along with the most opportunities for peer and

other student social interactions, and the Achievement Center's program falling somewhere in between with one-to-one and small group instruction, and daily peer interactions. See, IHO Decision at 12, ¶¶ 43-44, citing Mandell (Tr. 200-226); at 16, ¶¶ 66, citing Gerber (Tr. 415-419); at 21-22, ¶¶ 107-108, citing D'Aliberti (Tr. 520-23, 532-34); (e.g., at the Achievement Center, Jacob had experienced some opportunities to interact with both higher functioning and normally developing peers, whereas the Monarch School provided absolutely no such interactions and, in fact, limited lunchtime to include only one other student).

Arguably, then, the arrangement at Monarch could even be characterized as regressive to Jacob's needs for improved and increased social interactions.[5] See, e.g. testimony of J. Newlin (Tr. 605) who did not consider the Monarch School an appropriate fit for Jacob's educational needs; IHO Decision at 24, ¶ 116. See, also, IHO Decision at 40, citing 34 CFR § 300.551 (b)(1) ("the parent wishes to maintain the child's placement on the continuum of alternative placements [citation omitted] at a special *school*, which is one step further along the continuum, i.e., more restrictive that the IEP team's recommendation of special *class*.") (emphasis added); 20 U.S.C. § 1412 (I)(5)(A); 34 C.F.R. § 300.551. As IHO Freda points out, contrary to the obligations under IDEA to provide services in an inclusionary environment to the maximum extent possible, "the child, who now attends Monarch School, is effectively being educated in a one-to-

[5] Furthermore, Jacob's lead teacher at the Achievement Center testified that Jacob tended to "pick on" lower functioning students and was more successful with behavior and academic goals when he interacted with peers and higher functioning students. See, IHO Decision at 20¶ 99, J. Gerber (Tr. 479). Yet, currently, at the Monarch school, Jacob is one of the highest functioning students; only two or three students out of 23 students are higher functioning than Jacob. IHO Decision at 11-12, ¶¶ 41, 45 citing Mandell (Tr. 75, 203, 228-29).

one environment that incorporates minimal contact with other children with disabilities and no contact with nondisabled students." IHO Decision at 40; 34 C.F.R. § 300.347.

At the very least, however, before Jacob attends a *more* restrictive environment, under IDEA, it *must* be found that Jacob could not achieve any educational success in the more inclusive, public environment favored by IDEA. 34 C.F.R. § 300.347. (school district must provide special education in an inclusionary environment with disabled and nondisabled students to the maximum extent possible). Indeed, IDEA and the case law both *disfavor* non-public school placements and support private placements only when it has been clearly demonstrated that no educational progress can he made in the public school environment. See, e.g., *Rowley, 458 U.S. at 208; Dong*, 31 IDELR at 157.

It is concluded then, after a *de novo* review of the record, that IHO Freda's decision is thorough and well-reasoned, and that all evidence, both testimonial and documentary, was appropriately examined in her lengthy and well-supported decision. Contrary to parents' assertion that IHO Freda considered only the LRE and not the services need by Jacob, in her decision, IHO Freda thoughtfully addressed each of the related services needed by Jacob to continue to progress educationally, as well as whether the school district could adequately and appropriately provide each of those services to Jacob at the public placement at Pleasant Valley. Further, upon *de novo* review, IHO Freda's determination that, under IDEA, the Pleasant Valley Elementary School is the appropriate placement, as the LRE with the most inclusive opportunities *and* related services, for Jacob is affirmed as well supported in law and fact. Accordingly, the assignment of error that IHO incorrectly considered the LRE as the key issue and not the related services is found to be completely without merit.

C. Smaller Classrooms

Next, the parents argued that the "IHO erred when she asserted that smaller class size was not a critical element for Jacob W[]'s education." Parents' Appeal Brief at 4-5, ¶3. Parents argued that the "IHO mistakenly took the view that one on one instruction was 'the best education possible' and that school district need not offer the 'best to children' in order to supply an appropriate education under the standards set by *[Rowley]*." See, Parents Appeal Brief at 5. The parents argue that Jacob has an "absolute need for one on one instruction," yet agree throughout their brief that Jacob experienced educational success at the Achievement Center which offered only some one on one instruction and has been successfully transitioning Jacob to small groups and more social interactions. See, Parents' Brief at 5 ("uncontested that Jacob had made excellent progress at the Achievement Center); IHO Decision at 8, ¶ 26 (Bd. Ex. N), at 16, ¶ 69 citing Gerber (Tr. 438-39).

Curiously, then, parents go on to point out that the Monarch School would provide almost exclusively one-to-one instruction even though Jacob had been receiving both one-to-one and small group education at the Achievement Center. Parents' Brief at 5 ("Jacob's work at the Achievement Center had been *largely* one on one and Monarch, the proposed school was almost *exclusively* one on one") (emphasis added). The only support offered as persuasion that Jacob now needs exclusively one-to-one instruction was a statement that "Amy Lumadue who had worked with Jacob for years stated that one on one instruction was key and that Jacob lost focus when additional individuals were involved."[6] See, Parents' Appeal at 5.

---

[6] Actually, parents assert that "the absolute need for one on one instruction was documented by the teachers who knew Jacob best."

Because no citation to the record was provided, it was difficult to find Ms. Lumadue's statement that the parent relied upon; however, in reviewing her testimony, it was found that Ms. Lumadue did state that Jacob was sometimes distracted "when more people were in the room," but it could not be found that Ms. Lumadue thought that "one on one instruction was key." See, testimony of Lumadue (Tr. 255); IHO Decision at 14, ¶ 57, Tr. 247-250 (Lumadue). In fact, Ms. Lumadue now instructs Jacob in a small group of four children. IHO Decision at 14, ¶ 55, Tr. 251 (Lumadue).

In fact, it is clear that Ms. Lumadue was in favor of increasing Jacob's social interactions with his own peers as well as higher functioning and normally developing peers, an opportunity that would not be available at the Monarch School. See, testimony of Lumadue (Tr. 247-255); See, also, School District's Brief at 2; IHO Decision at 14, ¶ 57, citing Lumadue (Tr. 247-250, 255) (opining that Jacob needs to develop his social skills in larger group settings because life skills typically occur in an environment "with a lot of people around you.").

Thus, the suggestion that Jacob has an "*absolute* need for one-to-one instruction" is not supported in the record; indeed, the record supports the opposite conclusion that Jacob has a need for more social activities including more small group instruction as well as peer and non-peer interactions. See,

---

Parents' Brief at 5 (emphasis added). Completely contrary to the parents assertion, the "teachers who knew Jacob best" in fact agreed that Jacob could succeed educationally in less than a one on one environment, a point already discussed in § B, *supra*, at 20-21. Indeed, the one teacher "who knew Jacob best," his lead teacher at the Achievement Center, Ms. Gerber, thought that Jacob could be served in a special education class at Pleasant Valley and "believe child would benefit from a school environment with more typical peers." IHO Decision at 17, ¶¶ 173, 174, citing Gerber (Tr. 462-63). In the interest of time and space, however, the argument will not be further revisited here.

e.g. testimony of Lunadue (Tr. 255), Gerber (Tr. 463-64). Therefore, IHO Freda did not "mistakenly take the view that one on one instruction was the best education possible . . . [instead of finding that] Jacob had an absolute need for one on one instruction." Rather, IHO Freda simply found no evidence to support parents' assertion that Jacob required one-to-one instruction. See, IHO Decision at 29, ¶ F. Indeed, IHO Freda found overwhelming evidence to the contrary, and concluded that Jacob would benefit educationally from the more inclusive and less restrictive environment at Pleasant Valley. See, IHO Decision at 31, ¶ L; at 42-45.

In addition, then, parents go on to argue that the IHO made a flawed conclusion "that there was no evidence that Jacob could not learn effectively with less one on one" because *first*, she could not "calculate the gains made by a child in a certain set of conditions and then potentially change the conditions and project similar gain, and *second*, "she again misunderstands the burden of proof for this change in placement."

First, it is a completely disingenuous and contradictory argument to suggest that IHO Freda improperly considered that the academic progress at the Achievement Center would help predict or "project" similar academic progress at another or "changed" environment. Indeed, this is the very same argument that is at the heart of the Parents' Appeal: considering Jacob's progress at the Achievement Center, it must be concluded (i.e. "projected") that Jacob would educationally progress at the Monarch School. See, IHO Ex. 26 (Parents' Statement of the Issues: (a) . . . the child should continue his education at Monarch School – an extension of the Achievement Center); Parents' Appeal at 6, § 4 (Jacob was educationally successful at the Achievement Center where they used the TEACCH methodology and the Monarch School offers the same methodology); Parents'

Appeal at 5, § 2 ("Jacob's work at the Achievement Center had been largely one on one and Monarch, the [parents'] proposed new school, was [*sic*] almost exclusively one on one.") That is, because of Jacob's progress at the Achievement Center, the parents argue that Jacob must be placed at the private Monarch School.[7]

Parents, then, cannot say that the IHO's argument was flawed just because in considering the same progress at the Achievement Center, she concluded that Jacob should be placed at the public school. Same educational gains "calculated," and same educational gains "projected" just different conclusions as to the "condition changes." Therefore, parents' first argument in support of asserting that IHO Freda erred because she projected similar gains in a changed environment in concluding "that there was no evidence that Jacob could not learn effectively with less one on one" completely fails.

In addition, parents second argument to support their contention that IHO Freda erred in concluding that Jacob could succeed educationally with less one on one instruction suggests that the IHO "again misunderstands the burden of proof for this change of placement." Parents' Appeal Brief at 5. Without any legal authority whatsoever, parents argue that "[I]t is not appropriate nor fair that parents be asked to prove that education cannot take place with more children present. It is the district's burden to show that similar educational

---

[7] To follow this logic, it must be assumed that the Monarch School is the same "set of certain conditions" as the Achievement Center whereas Pleasant Valley is a different "set of conditions." This assumption fails, however, because the entire record supports the conclusion that the Monarch School is also different from the Achievement Center, i.e. the Monarch School uses exclusively one-to-one instruction while the Achievement Center employed both group and one-to-one instruction as well as opportunities for higher functioning and normally developing peer interactions.

gains are possible with changed circumstances." Id. Not only is this statement contrary to law, but, unbelievably, parents continue that "[t]his is especially true when these changed circumstances are *forced* upon a student who has demonstrated great educational gains in the previous environment." Id. (emphasis added).

Although this argument, and logic, is certainly difficult to follow, presumably the parents truly believe that the Monarch School *is not* a change in circumstances while Pleasant Valley Elementary is a change in circumstances. Likewise, similar to the burden of proof argument, the faulty assumption here is that the changed circumstances are "forced" upon Jacob.

Because Jacob has completed preschool and is ready for a school age environment Jacob's circumstances must necessarily change and *both* the Pleasant Valley Elementary School and the Monarch school are changes in circumstances for Jacob. The difference in the two programs is that the public program is a little less restrictive (e.g., six to eight students with a teacher and two aides) and a little more inclusive (e.g., school assemblies, recess, and lunch with non-disabled peers) than the Achievement Center that Jacob has been used to attending and the private program is a little more restrictive (e.g., "almost exclusively one on one instruction") and a little less inclusive (e.g. lunch with only one other student) than the Achievement Center. See, IHO Decision at 42-45.

Finally, parents suggest that the "level of service to the child was already established by the institution permitting the service." See, Id. at 6. Certainly, under IDEA, that a "particular institution," rather than an IEP team, would "establish" a "level of service" is a completely novel interpretation of the rules and regulations. See, 20 U.S.C.A. § 1412; 34 C.F.R. § 300.552 (b) (annual determination of

placement and related services by IEP team); 34 C.F.R § 300.347 (FAPE). Presumably, then, once a child was placed at a "particular Institution" there would not be a need for an IEP team; nor would the related services necessarily need to be reevaluated each year since the "particular institution" would "establish" the services.

Of course, the notion that an institution "establishes" its own services required for a child to receive FAPE under IDEA is completely contrary to law. On the other hand, if the parent was not seeking reimbursement or funding from the public school district, then a private institution and the parent, could, in fact, establish what services a child would receive at that particular institution. When the parent, however, looks to the school district for the payment of their child's education and services necessary to receive an education, then the school district has both the responsibilities and the choices to assure that the child has the appropriate educational opportunities.

Nowhere in law is it supported that the parent selects a program and the school district pays for it. Nor can a parent even expect or demand that a particular program continue from year to year. To the contrary, because the school district is financially responsible for the education of the children in their district, then the school district is responsible, with deference given, to choose the methods, manners, and placements of the education and services; parents cannot dictate a particular program or method. See, *Rennet v. Board of Education of the Public Schools or the City of Ann Arbor*, 185 F.3d 635, 645 (6th Cir. 1999) (citing to *Rowley, 458 US. at 208*).

In addition, while the parents may prefer a particular methodology or program for their child, the school need only *consider* the parent's request and not, necessarily, include or use the parent-preferred program, even if the parent-

suggested methodology has been shown to be superior to the methods chosen by the school. See, *Rowley*, 458 U.S. at 207-208. Indeed, the Sixth Circuit, interpreting *Rowley*, explained:

> The Act requires that schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student, [while] appellant demands that [school] provide a Cadillac. . . We hold that the Board is not required to provide a Cadillac and that the proposed IEP is reasonably calculated to provide educational benefits to the appellant, as is, in compliance with the requirements of IDEA.

Doe v. Board Of Education of Tullahoma City Schools, 9 F.3d 455, 456-60 (6th Cir. 1993). Furthermore, "while educational progress is important, IDEA does not require maximizing goals." *Metropolitan Nashville and Davidson County School v. Guest*, 90 F. Supp. 905, 910, (6th Cir., 1995) citing *Tullahoma*, 9 F.3d at 459.

As pointed out by the school district in theft brief "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." See, School District's Brief at 5, citing to *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). IHO Freda simply concluded that Jacob would benefit educationally from the Pleasant Valley Elementary School placement, the less restrictive public program, as well as the Monarch School, the more restrictive private program and, accordingly, the school district did not have to choose to fund the private program to provide a FAPE to Jacob.

Furthermore, although deference is given to IHO Freda in her consideration of the sufficiency and weight of the

evidence to determine whether Jacob required a smaller classroom or even a one-to-one instruction plan, a *de novo* review of the testimony of both parent and school district witnesses overwhelmingly supports IHO Freda's conclusion that Jacob does not require a one on one instruction or very small classroom environment. To the contrary, the witnesses agreed that Jacob could, should, and would be successful in a more social environment that included his own peers as well as higher functioning and normally developing peers. In fact, there was no evidence to support Jacob's need to regress from the Achievement Center's small classes to the even smaller, more restrictive classes and lesser social interactions ("exclusively one on one) at the Private School.

While it may be parents' belief that "it is not appropriate or fair that parents be asked to prove that education cannot take place with more children present" it is nonetheless the law under well-settled case law and IDEA when parents are seeking public funds for a private school placement. IHO Ex. 19 (Parents' Statement of Issues). That is, it is the school district's responsibility to provide FAPE; the parents disagreement or dislike of the programs chosen by the school district are not sufficient reasons to require that the school district pay for a private education of the parents' choosing; the school district must simply provide *some* educational benefit for the child. See, *Rowley, 458 U.S. at 208.* Furthermore, "when consensus is not possible, the ultimate responsibility for the provision of FAPE to a student rests with the school district." 34 C.F.R. § 300 Append. C, Question 9; See, IHO Decision at 30, ¶ G.

Thus, IHO Freda did not abuse her discretion in weighing the sufficiency and credibility of the evidence; finding that Jacob could be educated at the Parma public schools was well supported in law and fact and was not clearly erroneous. Accordingly, IHO Freda did not err in determining that Jacob

does not require a smaller classes or the mostly one on one instruction in the environment of the Private School.

D. Methodology

The parents also argue that the "IHO erred when she minimized the importance of the current TEACCH methodology used with Jacob and failed to recognize the inadequate effort made by the Parma Schools to certify an instructor in that methodology." Parents' Appeal Brief at 6, ¶ 4. The parents also point out that the IHO "rightfully points out that Parma is not mandated to use the TEACCH methodology: and that the IHO "rightly points out that the method of instruction is within the province of the school district." Id. at 6-7, *citing Lachman v. Illinois State of Educ.*, 853 F.2d 290 (7th Cir., 1988).

Methodology decisions as well as appropriate personnel and training are all issues that are properly left to the discretion of the school district. See, *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998). Indeed, the Sixth Circuit has warned that, "[p]laintiffs are not entitled to prescribe or require a specific desired methodology." *Renner v. Board of Education of the Public Schools or the City of Ann Arbor*, 185 F.3d 635, 645 (6th Cir. 1999) (citing to *Rowley*, 458 U.S. at 208).

Notwithstanding the fact that the parents agree with the IHO's legal standard regarding the school district's right to choose methodology, the parents nonetheless craft a sort of "good Samaritan" type argument that *because* Parma tried to adopt and incorporate the TEACCH method, then they are now responsible for completing the training and perfecting the TEACCH method to match to competencies of the TEACCH educators at the Achievement Center and Monarch School. See, Parents' Appeal Brief at 7. Thus, they argue, the IHO erred when she "failed to recognize the inadequate

effort made by the Parma Schools to certify an instructor in [TEACCH] methodology." Id. at 6.

Of course, parents did not and could not cite to any authority to support the proposition that even though a school district has the discretion to choose a methodology, once they start training individuals in a certain methodology, then the training must be superior and not "slip shod," "inadequate," or "inferior" as compared with other programs using the methodology. Id. at 6-7. Certainly, this argument is completely without merit and unfounded in law.

Additionally, parents try to suggest that because the IHO "accepted throughout her decision the fact that Jacob had made great progress educationally while at the Achievement Center" then the IHO must also accept that the TEACCH methodology must be provided for Jacob because the Achievement Center used TEACCH. Id. at 6. In fact, as the school district pointed out in their brief, the Achievement Center "use[s] a variety of methodologies including TEACCH, floor time, and applied behavior analysis." School District Brief at 2, citing to Tr. 413; "Ms. Gerber [Jacob's lead teacher at the Achievement Center] testified that the use of several methodologies was helpful." Tr. 429 (Gerber) (various methodologies incorporated at the Achievement Center included TEACCH, floor time, PECS). Indeed, Ms. Gerber stated that Jacob did not need a specific methodology to succeed; rather, he required a structured system to help him maintain his focus. IHO Decision at 16, ¶ 68 citing Gerber (Tr. 432-33); See, also, IHO Decision at 27, ¶ 134, citing Foley (Tr. 360).

Again, no authority is cited for the legal standard that when a particular methodology used at one school results in educational success, then that methodology must be provided at a subsequent school placement. To the contrary, as *Renner* warned, parents are not entitled to require a particular

methodology, even if such methodology has been shown to be successful. See, *Renner*, 185 F.3d at 645, citing *Rowley*, 458 U.S. at 208. Thus, the argument that Jacob must attend a facility that employs the TEACCH methodology is based only upon a faulty logical assumption and is contrary to well-settled law regarding methodology determinations.

Therefore, the parents have not shown that the IHO erred when she "minimized the importance" of employing the TEACCH methodology in providing a FAPE for Jacob. In fact, to the contrary, a review of the record does not support the conclusion that Jacob needs the specific TEACCH methodology to succeed educationally; in fact, the witnesses all agreed that only something "like" TEACCH would be a good program approach to Jacob's education. See, THO Decision at 16, ¶ 68 citing Gerber (Tr. 432-33); at 27, ¶ 134, citing Foley (Tr. 360). Further, IHO Freda was in the most "unique" position to judge the credibility of the witnesses; thus, IHO Freda did not abuse her discretion by deferring the methodology decisions to the school district. Accordingly, the IHO's decision is affirmed in determining that the specific TEACCH methodology is not a requirement for Jacob's education under IDEA.

E. Dr. Levinson's Testimony

Finally, the parents argue that the "IHO erred when she disregarded Dr. Morris Levinsohn's medical diagnosis on the basis of a lack of contact with the child and lack of observation of the child in the classroom." See, Parents Appeal Brief at 7, ¶ 5. Further, the parents argue that the "IHO was not qualified to disregard Dr. Levinsohn's medical diagnosis." Id.

The parents agree that Dr. Levinsohn had not seen Jacob in class; but, rather that Dr. Levinsohn had seen Jacob in his office for four lengthy visits (forty to ninety minutes each)

over a three year period and, in addition, on several casual occasions because Jacob's mother works in the same facility as Dr. Levinsohn. Id. at 7-8. The parents argue, then, that the IHO erred in considering that Dr. Levinsohn's contact with Jacob was only "minimal" because, as compared with other witnesses, Dr. Levinsohn's interactions with Jacob amounted to more time and more knowledge about Jacob than "any of the Parma educators." Id. at 8.

Nonetheless, in challenging the credibility of witnesses, the IHO, as the factfinder, has the "unique opportunity of observe the demeanor of the witnesses" and, thus, is in the best position of deciding whether such a particular witness is credible or not. *Brock v. L.E. Myers Co., Hight Voltage Dist.*, 818 F.2d 1270, 1279 (6th Cir., 1987). A review officer, then, "defers to the hearing officer's factual findings based on credibility judgments about the witness presented at the hearing." *Carlisle Area School*, 62 F.3d at 537, citing to *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985); See, also, Fed. R. Civ. P. 52 (a).

Therefore, when reviewing a fact-finder's determination on the credibility or believability of a witness, without significant evidence to the contrary, the impressions and opinions as to the credibility and reliability of testimony is given substantial deference to the finder of fact and the reviewing decision-maker should not overturn, "unless the record in its entirety would compel a contrary conclusion." *Carlisle Area School*, 62 F.3d at 537; See, also, *Thomas* 918 F.2d at 624. That is, when the IHO has the discretion to make the determination complained of by the Parents, including judging the sufficiency and weight of the evidence, the review standard is to give deference to the IHO unless it can be demonstrated, by the party raising the issue on appeal, that such judgments were clearly erroneous. *Id.*

It is concluded that IHO Freda did not deprive Jacob of educational opportunity, or cause "positive harm" to the parents because she did not adopt an educational recommendation from the student's treating physician. Accordingly, this assignment of error is also found to be without merit.

In addition, parents complain that although Dr. Levinsohn recently diagnosed Jacob with disruptive behavior disorder, a diagnosis that parents believed further supported Jacob's need for one-to-one instruction, "unbelievably the IHO dismissed this diagnosis as lacking a 'high degree of credibility.'" See, Parents' Appeal Brief at 8. To support their argument, parents offer only this statement: "While the IHO certainly is a qualified lawyer, well versed in the law, it is doubtful that she possess a medical degree and the medical experience to disregard a specific diagnosis of a medical condition from a physician with over twenty-five year of experience working with children in need." Id.

Parents do not offer a cite to the decision where IHO Freda made such offending conclusions that would have required her to have a medical degree; nor do parents even offer citations to the record where Dr. Levinsohn's testimony would compel a decision or judgment contrary to those made by IHO Freda. Perhaps more significantly, parents do not offer any evidence regarding the educational impact of the disruptive behavior disorder diagnosis on Jacob's educational needs.[8]

---

[8] Because the diagnosis of disruptive behavior disorder is a relatively new diagnosis and was not considered at the IEP team meeting, June 2, 2003, parents can ask to convene the IEP team so that the new diagnosis can be considered and the parents can bring their concerns to the IEP team. In addition, the new diagnosis should be considered when the FBA is conducted (previously scheduled for September 30, 2003).

In fact, IHO Freda completely considered Dr. Levinsohn's new diagnosis and concluded that because there were no new assessments conducted and that the diagnosis was predicated on Jacob's historical profile and information provided by the parents, the new diagnosis carried little weight in the determination of whether the school district provided FAPE. IHO Decision at 51-54. In addition, IHO Freda appropriately concluded that the mere existence of a diagnosis does not lead to any particular conclusions regarding the education of a child. See, School District's Brief at 18, citing 20 U.S.C. § 1400 (d)(l)(A), 34 C.F.R. § 300.347 (a)(2)(i). Thus, the argument that the "IHO was not qualified to disregard Dr. Levinsohn's medical diagnosis" is merely a statement of opinion of no legal substance and little value other than to belittle IHO Freda.

Indeed, to the contrary, the IHO is quite qualified to consider the weight and sufficiency of expert witness testimony, including physicians, as it relates to *the educational needs* of a child. Likewise, the IEP team is qualified to consider the medical opinions of physicians when designing an appropriate IEP for the *educational needs* of a child. See, 34 C.F.R § 344 (IEP team). In neither case, do the lawyers, hearing officers, educators, or school officials presume to substitute their opinions for the medical opinion; rather, in determining an appropriate educational program for a particular child, all opinions, including medical opinions are considered when developing the IEP.

Indeed, the IEP team is purposely formed so that a single individual doesn't make the educational plans for a particular student. 20 U.S.C. § 1414; 34 C.F.R. § 300.347. Thus, Dr. Levinsohn's recommendations must, under IDEA, be considered along with all the other recommendations; and, certain professional qualifications don't necessarily carry more influence on the process than another. Thus, as pointed out by the school district, an extremely well qualified

physician may not have as much practical or effective advice regarding a child's daily school needs as the teacher who spends each day in school with the child and knows first hand what has and has not worked for that child. School District's Brief at 16.

In any case, the IEP team members and hearing officers do not need a medical degree to consider the relevancy, impact, or importance of the medical opinion on the *educational needs* of the child. Likewise, the medical professional does not need a teaching degree or law degree to make educational suggestions subsequent to his medical opinion about a particular child. In fact, IDEA was enacted to avoid such categorical determinations regarding a child's need for educational services; the underlying purpose of IDEA is to assure individualized services for each child regardless of the particular diagnosis. 20 U.S.C. § 1400 (c) (d).

Thus, when the *educational suggestions* of the medical professional are considered but not implemented by the IEP team and/or not found persuasive by the IHO, there is no error unless a party can demonstrate that the *educational suggestions* made by the medical professional (or any other professional) were completely disregarded by the IHO in determining whether the IEP would provide a FAPE to the student. The parents have not demonstrated that IHO Freda completely disregarded the opinions of Dr. Levinsohn; the parents have simply shown that in considering Jacob's need for one to one instruction and music therapy, IHO Freda relied upon the weight and sufficiency of testimony of the "Parma educators" (as well as the Achievement Center educators), over the testimony of Dr. Levinsohn where they believe that Dr. Levinsohn's testimony should have carried more weight. Parents' Brief at 8. See, IHO Decision at ¶¶ 28-142 (Findings of Fact).

Indeed, had Dr. Levinsohn had, in act, suggested that Jacob had an *absolute need* for one-to-one instruction, he would have been alone in opinion, from a review of the record, Dr. Levinsohn's sole opinion could not have outweighed all of the other witnesses who believed, in varying degrees, that Jacob was benefiting from increased group interactions and increased social opportunities and did not need exclusive one-to-one instruction without learning peer social skills. See, § C, *supra*.

Finally, and significantly, parents suggest, in a footnote, that Dr. Levinsohn did not merely suggest that one-to-one instruction would be the "ideal or optimum program needed for Jacob's educational success but that this was required for any educational success." See, Parents' Brief at 7, fn 1. The parents offer no citations to the record nor quote any of Dr. Levinsohn's testimony to support this statement. On the other hand, in her decision, IHO Freda quoted Dr. Levinsohn as testifying that one-on-one instruction would be the "best case" for Jacob. See, IHO Decision at 52; at 18, ¶ 82 (Tr. 342); *cf.* Bd. Ex. 9 (Letter from Dr. Levinsohn, April 2, 2003) ("very strong medical recommendation that [the child] is clearly in need of a very intensive and comprehensive program to include continued speech, occupational, physical and musical therapy.")[9] After properly and thoroughly considering Dr. Levinsohn's opinion along with all of the other witnesses, IHO Freda determined that while one-to-one instruction might be a superior educational opportunity for Jacob, small group instruction would also offer Jacob appropriate educational opportunities for success as required under IDEA. See, IHO Decision at 42-45.

---

[9] As noted by the School District, Dr Levinsohn did not mention Jacob's need for one-to-one instruction in the April 2, 2003 letter. Post-Hearing Brief of School District at 42, fn 149.

In reviewing the transcript, the IHO did not misquote Dr. Levinson. See, Tr. 342. Thus, the IHO's determination that Dr. Levinsohn was offering a "best case" scenario for Jacob is supported in the testimony on the record. Likewise, IHO Freda did not "disregard" Dr. Levinsohn's opinion; to the contrary IHO Freda thoroughly considered all testimony, opinions, and documents in determining whether Jacob needed one-on-one instruction in order to receive a FAPE. See, IHO Decision at 31, ¶ L; at 51-54. Therefore, IHO Freda did not abuse her discretion, nor were her decisions clearly erroneous in determining, after considering the weight and sufficiency of all of the evidence including Dr. Levinsohn's medical opinions, that Jacob did not require only one-on-one instruction for any appropriate educational success. Accordingly, the assignment of error that IHO Freda erred in "disregarding" Dr. Levinsohn's testimony and that she was "not qualified" to disregard Dr. Levinsohn's testimony is without merit.

III. Relief

In their Conclusion, along with requesting a reversal of the IHO decision, the parents ask that "Parma Schools be directed by the State of Ohio to reimburse Monarch School for the education of Jacob Winkelman."[10] See, Parents' Appeal Brief at 9, ¶ "Conclusion."

---

[10] The Parents did not argue an assignment of error or offer evidence to support any reimbursement claims in the appellate brief; appellants simply asked that Monarch School be reimbursed. See, Appellant's Brief at 9. Indeed, specific fact-finding, including the appropriate notice and proof requirements, regarding any reimbursement claim *for parents* under IDEA is required at the IHO level before SLRO review is appropriate. See, e.g. *Florence*, 510 U.S. at 17. Furthermore, it is uncertain whether parents have the standing and/or whether the administrative process has the jurisdiction to order reimbursement to a third party. Finally, as concluded by IHO Freda, because "a FAPE was offered to the child, it is not necessary to review the program offered at the Monarch School to

The law under IDEA is well settled that reimbursement for the unilateral, unauthorized placement of a child in a private school may be granted to parents only if they can prove that the school district has not and could not provide FAPE to their child. See, *Florence County School District Four v Carter*, 510 U.S. 7, 15 (1993); see, also 20 U.S.C. § 1413(a) (IDEA 1997 Reauthorization Amendments). To prevail on a reimbursement claim for a private program, the parents have the burden of proving that they first notified the school of their intention to use public funds before enrolling the child in the program, and they must demonstrate both that the school district was not providing the necessary services and that the program selected by the parents was appropriate. *School Comm. Of Burlington v. Department of Ed. Of Mass.*, 471 U.S. 359, 374 (1985); see, *Florence*, 510 U.S. 7 at 15; see, also 20 U.S.C. § 1413(a).

Thus, the requirements under IDEA codified the decision in Florence which emphasized that the parents who do choose to unilaterally enroll their child at the private placement, without the agreement of the school district, act at their own financial risk and must bear the proof of demonstrating that the public placement is an *inappropriate* educational placement as defined under IDEA. *Id.*

Nowhere in the case law is there a suggestion that *if the parents don't think* that the public school district can provide appropriate services *for the upcoming year* then the parents are entitled to enroll theft child in a private program that they prefer to the public program and expect the public school to pay for the placement. In other words, the school district has the obligation to provide FAPE; accordingly, the school district has the attendant responsibility to select the appropriate placement. Only when the school district has

---

determine whether is constitutes an appropriate private placement, nor to address the issue of tuition reimbursement." IHO Decision at 54.

failed in their obligations and responsibilities to a student may a parent seek reimbursement for a private placement.

Thus, while the courts and IDEA gave the parents the opportunity to seek reimbursement from the school district for a private school placement when their child was in an inappropriate public environment, the parent also assumed a heavy burden to prove that that school district did not or could not provide FAPE in the public school placement. In other words, the courts and Congress agreed that the private school placement, at the public's expense was to be reserved as a last resort only for those children who the public school district absolutely could not educate under IDEA. Indeed, the courts have continued to warn that the parents cannot dictate to the school district where or how their child is educated and served under their IEP. See, e.g., *Florence*, 510 U.S. 7 at 15; *Burlington*, 471 U.S. at 374.

Here, the parties agree that the Parma Schools have provided FAPE to Jacob for the last two years as a preschooler at the private placement at the Achievement Center. The parents have not, however, clearly demonstrated and proved that Parma *will not* be able to provide FAPE to Jacob as a school age student at the public placement at Pleasant Valley Elementary School. To the contrary, the evidence overwhelmingly supports the conclusion that the Pleasant Valley Elementary School is the appropriate school age placement for Jacob.[11]

---

[11] Interestingly, in a very recent case, the court found that when a parent has no *intention* of enrolling their child in the public placement, but has the school district conduct evaluations for the purpose of obtaining reimbursement for a private placement, the parent is not entitled to the reimbursement *even when it was found that the school district could not provide FAPE. Miller v. San Mateo-Foster City Unified School District*, 2004 WL 1161377 (N.D. Cal. May 24, 2004), reasoning that the child suffered no compensable loss; *n.b.* in this court's jurisdiction (9th Circuit),

Further, when Jacob first attended preschool at age three, Parma Schools showed quick and appropriate responses to the parents' requests to change Jacob's environment, ultimately funding Jacob's placement at the Achievement School. See, Bd. Ex. G, I. J; IHO Decision at 19, ¶ 19, 22. Thus, Parma school district's history suggests that there would be an appropriate response should Jacob need a change in environment to continue to achieve educational success.

Accordingly, the relief requested in Parents' Appellant Brief is denied.

IV. Conclusion

During the hearing, IHO Freda received testimony from no less than twenty witnesses, provided by both parents and the school district, whom were either qualified experts in the field of autism and/or special education or teachers and therapists with direct and personal knowledge of Jacob. IHO Ex. 24. In her 54-page Decision, IHO Freda carefully and thoroughly considered the qualifications and role of each witness and summarized the relevant testimony regarding each witness's opinions and conclusions about Jacob's past and current educational progress and his further educational needs. In addition, IHO Freda considered each element of the proposed IEP along with each placement option in the context of Jacob's past educational successes with Parma City School District's IEP team and the Achievement Center LRE. See, IHO Decision at 38-51, § A-E (LRE, one-to-one instruction, speech therapy, occupational therapy, music therapy, and TEACCH methodology).

---

the school district bears the burden of proof. The court emphasized that reimbursement is an "equitable right" under IDEA thus "the conduct of both parties must be reviewed to determine whether relief is appropriate." *Id.* at 7 (citation omitted).

Further, IHO Freda appropriately applied the *Rowley* factors in reaching her conclusion that the Parma City School District provided a RAPE to Jacob. See, IHO Decision at 33-35. Likewise, IHO Freda correctly assigned the burdens of proof to the parents as required in this jurisdiction as a matter of law. See, IHO Decision at 29, ¶ E; at 32, "Decision"; at 35-36. Further, in concluding that Jacob was provided a FAPE, IHO Freda properly found that the IEP program proposed for Jacob for the 2003-2004 school year appropriately considered the school-age MFE, identified the child's needs for educational progress, established goals and objectives, and established the LRE as required under IDEA, and that the IEP was reasonably calculated to provide Jacob with an educational benefit. IHO Decision at 32.

In reviewing IHO Freda's findings of facts and conclusions of law, as well as reviewing the transcript and exhibits from the hearing, there is more than ample evidence to support IHO Freda's determination that the Parma School District can provide a FAPE for Jacob in the public school and that the LRE is the Pleasant Valley Elementary School. In fact, using a *de novo* standard, it would be difficult to argue that the Monarch School is truly the "best" or even appropriate placement for Jacob considering the overwhelming agreement among the witnesses for both parties that Jacob is both academically ready for kindergarten and socially ready for interactions with higher functioning peers.

Having found that each assignment of error is without merit and, further, finding that the Parents offered very scant, unsupported, and unspecific arguments for any of their allegation of procedural or substantive violations that resulted in a denial of FAPE for student, the Parents have not sustained their burden of proof on appeal by demonstrating and proving how the errors they raised were improperly decided in the IHO Final Decision.

Actually, and in fact, regardless of the Parent's failure to adequately or appropriately offer argument and references in support of their assignments of error, the Final Decision of IHO Freda is found to be extremely well reasoned, extraordinarily thorough, and completely supported in relevant law and numerous facts. Accordingly, IHO Freda's Decision is hereby AFFIRMED in its entirety.

IT IS SO ORDERED.

June 2, 2004 /s/ THERESA L. HAGEN
DATE THERESA L. HAGEN, ESQ.
STATE LEVEL REVIEW OFFICER

cc: Christina Henagen Peer, Esq.
Dr. Donald R. Menafee, Esq.
Arron Gregory, Ohio Dept. of Education

SUPREME COURT OF THE UNITED STATES

No. 05A506

JACOB WINKELMAN, ET AL., APPLICANTS

v.

PARMA CITY SCHOOL DISTRICT

ORDER

UPON CONSIDERATION of the application of counsel for the applicants, and the response thereto,

IT IS ORDERED that the order of the United States Court of Appeals for the Sixth Circuit issued November 4, 2005, in case no. 05-3886, is hereby stayed pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay will terminate automatically fifteen days after the date of the order denying certiorari. In the event the petition for a writ of certiorari is granted, this stay shall terminate upon the sending down of the judgment of this Court.

/s/ JOHN PAUL STEVENS
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Dated this 2nd
day of December 2005

969 G

Supreme Court, U.S.
FILED
DEC 15 2006
OFFICE OF THE CLERK

14

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL., PETITIONERS

v.

PARMA CITY SCHOOL DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

JEAN-CLAUDE ANDRÉ
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Avenue
Los Angeles, CA 90034
(310) 558-0932

QUESTION PRESENTED

To what extent, if any, may a non-lawyer parent of a minor child with a disability proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities in Education Act, 20 U.S.C. 1400 *et seq*.

PARTIES TO THE PROCEEDING

Petitioners are Jacob Winkelman, a minor, by and through his parents and legal guardians, Jeff and Sandee Winkelman; Jeff Winkelman; and Sandee Winkelman. Respondent is Parma City School District.

TABLE OF CONTENTS

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 1
I. Statutory framework 2
II. Factual and procedural background 5
Summary of Argument 11
Argument:
I. Parents may litigate IDEA cases *pro se* under 28 U.S.C. 1654 because they are real parties in interest in such cases 13
A. Congress viewed parents as "parties aggrieved" by adverse administrative decisions and, therefore, real parties in interest 17
1. Parents are real parties in interest to the administrative-level proceedings that must be exhausted as a condition precedent to suit 17
2. Parents are "parties aggrieved" under § 1415(g)(1) when they administratively appeal the results of a due process hearing in two-tier systems 20
3. Congress' use of the same "parties aggrieved" language in granting both the right to administrative appeal under § 1415(g)(1) and the right to sue under § 1415(i)(2)(A) requires that the term be given consistent meaning 21
4. Congress had no need to single-out parents from the collective group of "parties aggrieved" in § 1415(i)(2)(A) to make them real parties in interest 23

5. IDEA's provisions prohibiting challenges to the qualifications of educational agency personnel and conferring jurisdiction to award attorneys' fees confirm that parents are real parties in interest 25

B. Parents are real parties in interest regardless whether they bring claims alleging violations of IDEA's substantive right to a FAPE or procedural safeguards 30

1. Parents have their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE 31

2. Neither IDEA's right-to-administrative-appeal provision (§ 1415(g)) nor right-to-sue provision (§ 1415(i)(2)(A)) limits the right of "parties aggrieved" to sue for a substantive violation 35

II. Even if only the child possesses the substantive statutory right to a FAPE, parents should be able to bring that claim *pro se* 37

III. Congress' Refusal in 2004 to Enact a Provision Allowing Parental *Pro Se* Representation Is Irrelevant 43

Conclusion 45

TABLE OF AUTHORITIES

Cases:

Alaska Airlines, Inc. v. Brock,
480 U.S. 678 (1987) 44

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
126 S. Ct. 2455 (2006) 15

Barnett v. Memphis City Schools,
113 Fed. Appx. 124 (CA6 2004) 9

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 23

Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982) 2, 8, 41

Board of Educ. v. Kelly E. ex rel. Nancy E.,
207 F.3d 931 (CA7 2000) 21

Cavanaugh v. Cardinal Local Sch. Dist.,
409 F.3d 753 (CA6 2005) ..... *passim*

Cedar Rapids Comm. Sch. Dist. v. Garret F.,
526 U.S. 66 (1999) 12, 33

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 44

Cheung v. Youth Orchestra Found. of Buffalo, Inc.,
906 F.2d 59 (CA2 1990) 39, 40, 42

Collinsgru v. Palmyra Bd. of Educ.,
161 F.3d 225 (CA3 1998) ..... *passim*

Cudjoe v. Indep. Sch. Dist. No. 12,
297 F.3d 1058 (CA10 2002) 21

Deal v. Hamilton County Bd. of Educ.,
392 F.3d 840 (CA6 2004), cert. denied,
126 S. Ct. 422 (2005) 7

Department of Revenue v. ACF Indus., Inc.,
510 U.S. 332 (1994) 21-22

Devine v. Indian River County Sch. Bd.,
121 F.3d 576 (CA11 1997), cert. denied,
522 U.S. 1110 (1998) 24, 30, 38

Doe v. Board of Educ. of Baltimore County,
165 F.3d 260 (CA4 1998), *cert. denied*,
526 U.S. 1159 (1999) 32

Dolan v. United States,
126 S. Ct. 1252 (2006) 14

Emery v. Roanoke City Sch. Bd.,
432 F.3d 294 (CA4 2005) 33

FEC v. Akins,
524 U.S. 11 (1998) 17

Fernandez-Vargas v. Gonzales,
126 S. Ct. 2422 (2006) 28

Florence County Sch. Dist. Four v. Carter,
510 U.S. 7 (1993) 32

Ford v. Long Beach Unified School Dist.,
461 F.3d 1087 (CA9 2006) 31

Frazier v. Fairhaven Sch. Comm.,
276 F.3d 52 (CA1 2002) 21

Franklin v. Gwinnett County Pub. Sch.,
503 U.S. 60 (1992) 36

Gregory K. v. Longview Sch. Dist.,
811 F.2d 1307 (CA9 1987) 20
Guajardo v. Luna,
432 F.2d 1324 (CA5 1970) 37
Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 12, 21
Harris v. Apfel,
209 F.3d 413 (CA5 2000) 38-39
Herrera-Venegas v. Sanchez-Rivera,
681 F.2d 41 (CA1 1982) 37
Honig v. Doe,
484 U.S. 305 (1988) 13, 17, 29
Johns v. County of San Diego,
114 F.3d 874 (CA9 1997) 39, 40, 42
Kay v. Ehrler,
499 U.S. 432 (1991) 31
Koons Buick Pontiac GMC, Inc. v. Nigh,
543 U.S. 50 (2004) 14
Kruelle v. New Castle Co. Sch. Dist.,
642 F.2d 687 (CA3 1981) 20
Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 27-28
Leocal v. Ashcroft,
543 U.S. 1 (2004) 14-15
Lockhart v. United States,
126 S. Ct. 699 (2005) 44

Lucht v. Molalla River Sch. Dist.,
225 F.3d 1023 (CA9 2000) 26
Machadio v. Apfel,
276 F.3d 103 (CA2 2002) 38-39
Maldonado v. Apfel,
55 Supp. 2d 296 (S.D.N.Y. 1999) 38-39
Manchester Sch. Dist. v. Crisman,
306 F.3d 1 (CA1 2002) 24
Maroni v. Pemi-Baker Reg'l Sch.,
346 F.3d 247 (CA1 2003) ..... *passim*
Martin v. *Hadix*,
527 U.S. 343 (1999) 28
Mead Corp. v. Tilley,
490 U.S. 714 (1989) 44
Meeker v. Kercher,
782 F.2d 153 (CA10 1986) (per curiam) 40
Mertens v. Hewitt,
508 U.S. 248 (1993) 22
Mills v. Board of Education of the District of Columbia,
348 F. Supp. 866 (D.D.C. 1972) 2
Mosely v. Bd. of Educ.,
434 F.3d 527 (CA7 2006) 30
NASA v. Federal Labor Relations Auth.,
527 U.S. 229 (1999) 22
National Credit Union Admin. v.
First Nat. Bank & Trust Co., 522 U.S. 479 (1998) 22

Navin v. Park Ridge Sch. Dist. 64,
270 F.3d 1147 (CA7 2001) 38
Nixon v. Missouri Mun. League,
541 U.S. 125 (2004) 20, 43
Osei-Afriye v. Medical College of Penn.,
937 F.2d 876 (CA3 1991) 39, 40, 42
Pension Benefit Guaranty Corp. v. LTV Corp.,
496 U.S. 633 (1990) 44
Pennsylvania Ass'n for Retarded Children v. Pennsylvania,
334 F. Supp. 1257 (E.D. Pa. 1971) 2
Pennsylvania Ass'n for Retarded Children v. Pennsylvania,
343 F. Supp. 279 (E.D. Pa 1972) 2
Pennhurst State Sch. and Hosp. v. Halderman,
451 U.S. 1 (1981) 15
Puerto Rico Dep't of Consumer Affairs v.
Isla Petroleum Corp., 485 U.S. 495 (1988) 44
Rettig v. Kent City Sch. Dist.,
788 F.2d 328 (CA6 1986) 20
Rosario v. Apfel, No. 96 Civ. 1227, 1998 WL 685173
(S.D.N.Y. Sept. 30, 1998) 38
Rousey v. Jacoway,
544 U.S. 320 (2005) 14
Schaffer v. Weast,
126 S. Ct. 528 (2005) ..... *passim*
School Comm. of Burlington v. Dep't of Educ.,
471 U.S. 359 (1985) 14, 32

S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.,
448 F.3d 601 (CA2 2006) 31
Sorenson v. Secretary of Treas.,
457 U.S. 851 (1986) 22
Springer v. Fairfax County Sch. Bd.,
134 F.3d 659 (CA4 1998) 41
State v. Ritchie,
757 P.2d 1247 (Idaho Ct. App. 1988) 37-38
Town of Burlington v. Dep't of Educ.,
736 F.2d 773 (CA1 1984) 41, 42
Trailmobile Co. v. Whirls,
331 U.S. 40 (1947) 44
Trafficante v. Metro. Life Ins. Co.,
409 U.S. 205 (1972) 17
United States v. Craft,
535 U.S. 274 (2002) 44
Wenger v. Canastota Cent. Sch. Dist.,
146 F.3d 123 (CA2 1998) (per curiam),
cert. denied, 526 U.S. 1025 (1999) 30, 38
West Platte R-II Sch. Dist. v. Wilson,
439 F.3d 782 (CA8 2006) 41
W.G. v. Board of Tr. of Target Range Sch. Dist. No. 23,
960 F.2d 1479 (CA9 1992) 7
Winkelman v. Parma City Sch. Dist.,
166 Fed. Appx. 807 (CA6 2006) 10
Woodside v. School Dist. of Philadelphia Bd. of Educ.,
248 F.3d 129 (CA3 2001) 31

Statutes & regulations:

28 U.S.C. 1654 ..... *passim*
Individuals with Disabilities Education Act,
20 U.S.C. 1400 *et seq.*
20 U.S.C. 1400(c)(2)(D) 31
20 U.S.C. 1400(c)(2)(E) (2000) 33
20 U.S.C. 1400(c)(3) 3, 4, 31, 34
20 U.S.C. 1400(d)(1)(A) 3, 42
20 U.S.C. 1400(d)(1)(B) 3
20 U.S.C. 1400(d)(3) 4
20 U.S.C. 1401(9) 32
20 U.S.C. 1401(9)(D) 34
20 U.S.C. 1401(10)(E) 12, 25
20 U.S.C. 1401(26)(A) 8, 9
20 U.S.C. 1401(29) 32
20 U.S.C. 1412(a)(1)(A) 3
20 U.S.C. 1412(a)(4) 3
20 U.S.C. 1412(a)(10)(B)(i) 32
20 U.S.C. 1412(a)(10)(C)(ii) 32
20 U.S.C. 1414(d) 3
20 U.S.C. 1414(d)(1)(B) 4, 34
20 U.S.C. 1414(d)(1)(C) 4
20 U.S.C. 1414(d)(3)(D) 4
20 U.S.C. 1414(d)(4)(A)(ii)(III) 4
20 U.S.C. 1415(a) 4
20 U.S.C. 1415(b)(1) 4, 34
20 U.S.C. 1415(b)(2) 35

20 U.S.C. 1415(b)(3) 5, 34
20 U.S.C. 1415(b)(6)(A) 5, 35
20 U.S.C. 1415(b)(6)(B)..... 11, 18
20 U.S.C. 1415(b)(8)..... 18
20 U.S.C. 1415(c)(2)(B)..... 18
20 U.S.C. 1415(d)(2)..... 4, 19, 24
20 U.S.C. 1415(e)(2)..... 17, 20, 32
20 U.S.C. 1415(e)(2)(A)(ii)..... 19
20 U.S.C. 1415(e)(2)(F) 27
20 U.S.C. 1415(f)(1)..... 7, 19
20 U.S.C. 1415(f)(1)(A) 5, 26
20 U.S.C. 1415(f)(3)(E)(ii) 31
20 U.S.C. 1415(g)..... *passim*
20 U.S.C. 1415(g)(1) ..... *passim*
20 U.S.C. 1415(h) 18, 23
20 U.S.C. 1415(h)(2)..... 18, 24, 40
20 U.S.C. 1415(i) 43
20 U.S.C. 1415(i)(2)..... 7
20 U.S.C. 1415(i)(2)(A)..... *passim*
20 U.S.C. 1415(i)(2)(C) 24, 32, 40
20 U.S.C. 1415(i)(3)(A)..... 12, 26
20 U.S.C. 1415(i)(3)(B) (2000) 26
20 U.S.C. 1415(i)(3)(B) 26, 31
20 U.S.C. 1415(i)(3)(B)(i)..... 26, 28, 29
20 U.S.C. 1415(i)(3)(B)(i)(I)..... 26, 28
20 U.S.C. 1415(i)(3)(B)(i)(III) 41
20 U.S.C. 1415(i)(3)(D)(i) 27

20 U.S.C. 1415(i)(3)(D)(i)(III) 27
20 U.S.C. 1415(i)(3)(E) 27
20 U.S.C. 1415(l) 11, 17
20 U.S.C. 1450 42
20 U.S.C. 1470 42
20 U.S.C. 1472 42
Education of the Handicapped Act,
Pub. L. 91-230, 84 Stat. 175 (1970) 2
Education for All Handicapped Children Act of 1975,
Pub. L. No. 94-142, 89 Stat. 773 2
Education of the Handicapped Act Amendments of 1990,
Pub L. No. 101-476, 104 Stat. 1103 2
Individuals with Disabilities Education Act,
P.L. 101-476, 104 Stat. 1103 (1990) 2
Individuals with Disabilities Education Act Amendments
for 1997, Pub. L. No. 105-17, 111 Stat. 88 2
Individuals with Disabilities in Education Improvement
Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 ..... 2, 27
34 C.F.R. 222.50 8
34 C.F.R. Part 300, App. A 18, 34
34 C.F.R. 300.511(a) 8
34 C.F.R. 300.517(b)(1) 15
64 Fed. Reg. 12406 (1999) 15
Ohio Admin. Code § 3301-51-08(D)(2) 7
Ohio Admin. Code § 3301-51-08(E) 7
Ohio Admin. Code § 3301-51-08(F) 7
Ohio Admin. Code § 3301-51-08(G)(3)(b) 8

Miscellaneous:

Am. Bar Ass'n, Comm'n on Nonlawyer Practice, *Nonlawyer Activity in Law Related Situations: A Report with Recommendations* (1995) 41

Black's Law Dictionary (8th ed. 2004) 17

Adam Liptak, *Nonlawyer Father Wins His Suit over Education, and the Bar Is Upset*, N.Y. Times, May 6, 2006, at A8 6

Norman J. Singer, *Sutherland Statutes & Statutory Construction* (rev. 6th ed. 2000) 22

150 Cong. Rec. S5430 (daily ed. May 13, 2004) 43

150 Cong. Rec. S5331 (daily ed. May 12, 2004) 40

H.R. Conf. Rep. No. 779 (2004) 44

H.R. Rep. No. 99-296 (1985) 19

S. Rep. No. 99-112 (1985) 19

S. Rep. No. 108-185 (2003) 45

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The district court's unreported memorandum of opinion (Pet. App. 3a-23a) is available at 2005 WL 1315728.

JURISDICTION

The district court entered judgment for respondent on June 2, 2005. Pet. App. 3a-23a. The court of appeals' order was entered on November 4, 2005. *Id.* at 1a-2a. The petition for a writ of certiorari was filed on February 2, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 35 of the Judiciary Act of 1789, 28 U.S.C. 1654, provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

2. The relevant portions of the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, are reproduced as an appendix to this brief.

STATEMENT

Petitioners Jeff and Sandee Winkelman, neither of whom is a lawyer, are the parents of petitioner Jacob Winkelman, a now-nine-year old boy afflicted with autism spectrum disorder. Petitioners brought this action under IDEA to challenge the appropriateness of the special-education program offered by respondent for Jacob and to vindicate various procedural violations of IDEA committed by respondent and the Ohio administrative hearing officer who presided over petitioners' administrative-level proceedings.

The district court entered judgment for respondent after finding that neither respondent nor the hearing officer violated IDEA. The court of appeals ordered the dismissal of petitioners' appeal because they were proceeding *pro se*. Petitioners seek reversal of that dismissal order.

I. STATUTORY FRAMEWORK

IDEA provides federal grants to States for assistance in the education of children with disabilities.[1] The Act

---

[1] IDEA traces back to the Education of the Handicapped Act (EHA), Pub. L. No. 91-230, 84 Stat. 175 (1970), which was Congress' first effort to address the needs of children with disabilities and their families. Because EHA did not stem the tide of overt discrimination in education against these children, parents and civil rights groups began turning to the federal courts, where they won substantial relief in two path-breaking decisions: *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972) and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania* (*PARC*), 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa 1972). The courts in these cases concluded (*PARC* through a consent decree) that systematic discrimination against children with disabilities in the provision of public education violated the equal protection and due process guarantees of the Fourteenth Amendment. *Mills*, 348 F. Supp. at 875; *PARC*, 343 F. Supp. at 279. The courts ordered an end to discrimination and entered broad injunctive relief. In the wake of these decisions, Congress substantially overhauled the EHA with the passage of the Education for All Handicapped Children Act of 1975 (EAHCA), Pub. L. No. 94-142, 89 Stat. 773. For a detailed history of the statute's early evolution, including the impact these cases had on the EAHCA, *see Hendrik Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 179-80 (1982).

In 1990, Congress changed the title of the statute to the Individuals with Disabilities Education Act. See Education of the Handicapped Act Amendments of 1990, Pub L. No. 101-476, § 901(a)(1), (3), 104 Stat. 1103, 1141-42. Congress reauthorized and revised IDEA in 1997, see Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 88, and did so again in 2004, renaming it the Individuals with Disabilities in Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

explicitly seeks to protect the rights of parents as well as children. See 20 U.S.C. 1400(d)(1)(B) (IDEA seeks "to ensure that the rights of children with disabilities *and parents of such children* are protected." (emphasis added)). Among its numerous provisions, IDEA contains 212 express references to "parent" or "parents" and 17 references to "family" or "families."

Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education" (FAPE), which includes special-education and related services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). The Act guarantees "children with disabilities *and the families of such children* access to a [FAPE]." 20 U.S.C. 1400(c)(3) (emphasis added).

To ensure that each disabled child receives a FAPE, IDEA requires local school systems to develop an individualized education program (IEP) for each child with a disability in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4), 1414(d). "Parents and guardians play a significant role in the IEP process." *Schaffer v. Weast*, 126 S. Ct. 528, 532 (2005). For example, local school systems must obtain informed consent from parents before evaluating the child and must notify parents of the procedures it proposes to use. 20 U.S.C. 1414(a)(1)(D)(i)(I), (b)(1). "[I]nformation provided by the *parent*" must be examined during this evaluation. 20 U.S.C. 1414(b)(2)(A), (c)(1)(A)(i) (emphasis added). The determination whether the child has a disability and how the child's educational needs will be satisfied "shall be made" by an "IEP Team" consisting "of qualified professionals and the *parent* of the child." 20 U.S.C. 1414(b)(4)(A).

For ease of reference, we refer to the statute as IDEA and cite to the statute as amended in 2004, unless otherwise indicated.

As members of the IEP Team, parents are expressly given numerous and repeated opportunities to shape their child's IEP. For example, "other individuals who have knowledge or special expertise regarding the child" may be added to the IEP Team "at the discretion of the *parent*." 20 U.S.C. 1414(d)(1)(B)(vi). Parents also have the right to require attendance of all IEP Team members at each IEP meeting. 20 U.S.C. 1414(d)(1)(C)(i). In developing and reviewing the child's IEP, the Team must consider "the concerns of the *parents* for enhancing the education of their child." 20 U.S.C. 1414(d)(3)(A)(ii) (emphasis added); *see also* 20 U.S.C. 1414(d)(4)(A)(ii)(III). After the IEP is created, the local school system may modify the IEP only after first holding a Team meeting unless "the *parent*" agrees otherwise. 20 U.S.C. 1414(d)(3)(D) (emphasis added). Finally, parents have a right to annual reevaluations of their child, before which local school systems must obtain the parent's consent. 20 U.S.C. 1414(a)(2), (c)(3).

IDEA also mandates that States and localities accord to "children with disabilities *and their parents*" a set of procedural safeguards to ensure the provision of a FAPE. 20 U.S.C. 1415(a) (emphasis added). "Congress placed every bit as much emphasis upon compliance with procedures giving *parents* and guardians a large measure of participation at every stage of the administrative process, * * * as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205-06. For this reason, Congress required educational agencies to give "to the parents of a child with a disability" "a full explanation of the procedural safeguards" available to them under the Act. 20 U.S.C. 1415(d)(2).

Among other things, those procedural safeguards include a guarantee that "parents of a child with a disability" be given "[a]n opportunity * * * to examine all records relating to [their] child." 20 U.S.C. 1415(b)(1) (emphasis added). "[P]arents of the child" must also be given "[w]ritten prior

notice" in advance of any change (or refusal to change) in their child's educational services. 20 U.S.C. 1415(b)(3). If parents are dissatisfied "with respect to any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to such child," they may file an administrative complaint. 20 U.S.C. 1415(b)(6)(A). Parents are likewise entitled to "an impartial due process hearing" on their complaint before either the local or state educational agency. 20 U.S.C. 1415(f)(1)(A). If the local agency conducts the due process hearing, "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). After exhausting administrative remedies, "[a]ny party aggrieved by the findings and decision" of the due process hearing or state-level review has "the right to bring a civil action * * * in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. 1415(i)(2)(A).

II. FACTUAL AND PROCEDURAL BACKGROUND

Beginning in July 2001, Jacob attended preschool at the Achievement Center for Children (ACC) because he did not respond well to respondent's preschool program. Jacob's parents and respondent agreed that ACC was an appropriate placement for Jacob's preschool education for the 2001-02 and 2002-03 school years. Pet. App. 4a.

On June 2, 2003, Jacob's parents and respondent's officials met to discuss Jacob's IEP for the 2003-04 school year – Jacob's kindergarten year. Respondent proposed an IEP that would educate Jacob in a special education classroom at one of respondent's elementary schools. This proposal was unacceptable to Jacob's parents. Specifically, Jacob's parents were concerned that the proposed IEP did not

contain a specific plan to implement occupational therapy, did not contain a sufficient amount of speech therapy or one-on-one instruction, and did not include music therapy. *Id.* at 5a.

On June 2, 2003, Jacob's parents filed a request for a due process hearing with respondent's superintendent alleging that the 2003-04 IEP proposed by respondent failed to provide Jacob with a FAPE. Meanwhile, Jacob's parents enrolled him at the Monarch School (Monarch), a school that specializes in educating autistic children, where "Jacob performed well" during the 2003-04 school year. But because Monarch's $56,000 annual tuition was prohibitively expensive,[2] Jacob's parents did not enroll him at Monarch for the 2004-05 school-year and instead educated him at home with supplementation from a one- to two-hour per week outreach program at Monarch. *Ibid.*

On February 25, 2004, the Impartial Hearing Officer (IHO) selected to preside over the petitioners' due process hearing issued a decision finding that respondent provided Jacob with a FAPE. Jacob's parents appealed to the State Level Review Office (SLRO), which on June 2, 2004, issued a decision affirming the IHO's decision. *Id.* at 6a. Petitioners were represented by counsel before both the IHO and SLRO.

---

[2] Jacob's sister, Jenna, also suffers from autism. Due to Jacob's mother's disability and the time required to care for Jenna and Jacob, the Winkelmans' household income is less than $40,000 per year. They have no savings, face a monthly mortgage payment of $1,300, and incur significant medical expenses for Jacob and Jenna. Because petitioners are unable to afford counsel, *see* BIO App. 34b; Adam Liptak, *Nonlawyer Father Wins His Suit over Education, and the Bar Is Upset*, N.Y. Times, May 6, 2006, at A8 (noting that one lawyer asked Jacob's mother for a biweekly fee of $2,600 or a payment every two weeks of twice the amount the family paid every month for their mortgage to represent Jacob in the court of appeals proceedings below), we represent petitioners on a *pro bono* basis.

Dissatisfied with the results of the administrative proceedings, on July 15, 2004, petitioners filed an action in the United States District Court for the Northern District of Ohio pursuant to 20 U.S.C. 1415(i)(2). The complaint listed all three petitioners as plaintiffs: Jacob's parents and Jacob, "by and through" his parents. JA 11. The complaint challenged the IHO's and SLRO's findings that respondent had provided Jacob with a FAPE and alleged that respondent and the IHO had violated petitioners' procedural rights under IDEA. In total, petitioners alleged three procedural violations and three substantive violations of IDEA. JA 17-19; Pet. App. 6a-22a. Specifically, petitioners alleged that their procedural rights were violated (1) when respondent predetermined to place Jacob in its own program "without meaningful input by Jacob's parents" prior to developing his 2003-04 IEP;[3] (2) when the IHO impermissibly allowed her research assistant to "co-preside" over the proceedings;[4] and

---

[3] A school district violates IDEA when it predetermines a child's placement and fails to give parents a "meaningful" opportunity to participate in the formulation of their child's IEP. See, *e.g.*, *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (CA6 2004) (holding that school district predetermined child's placement and violated parents' right to participate in IEP formulation process where school district refused to discuss parents' suggested alternative placement "even in the face of impressive results"), cert. denied, 126 S. Ct. 422 (2005); see also *W.G. v. Board of Tr. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484-85 (CA9 1992) (holding that school district violated IDEA when it independently developed a proposed IEP that would place the student in a preexisting, predetermined program and refused to consider other alternatives).

[4] IDEA gives "state authorities * * * limited discretion to determine who conducts [due process] hearings." *Schaffer*, 126 S. Ct. at 532 (citing 20 U.S.C. 1415(f)(1)). Ohio grants parents the right to participate in the selection of the hearing officer and to know the hearing officer's qualifications. See Ohio Admin. Code § 3301-51-08(D)(2) ("The office for exceptional children will send * * * a statement of the qualifications of each hearing officer * * * to both the parent and the district who will have the opportunity to agree upon a hearing officer."); *see also generally id.* § 3301-51-08(E), (F).

(3) when the administrative proceedings lasted longer than the forty-five days allowed by IDEA's implementing regulation.[5] JA 17-18; see also Pet. App. 7a-8a, 10a-11a; Pet. Mot. S.J. at 5-8. Petitioners alleged that IDEA's substantive right to a FAPE was denied because the 2003-04 IEP (1) did not contain specific goals and objectives for occupational therapy;[6] (2) reduced Jacob's speech therapy from ninety minutes to sixty minutes and did not provide for one-on-one academic instruction;[7] and (3) did not include music therapy.[8] See JA 18-19; Pet. App. 11a, 16a-17a, 21a;

---

[5] IDEA's implementing regulations specify that "[t]he public agency shall ensure that not later than 45 days after the receipt of a request for a [due process] hearing – (1) A final decision is reached in the hearing." 34 C.F.R. 300.511(a); accord, Ohio Admin. Code § 3301-51-08(G)(3)(b)).

[6] Among other things, an IEP must include "a statement of annual goals, including short-term objectives [and] a statement of the specific educational services to be provided the child." 34 C.F.R. 222.50. "[O]ccupational therapy" is a "related service[]" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including * * * occupational therapy * * *)" if the requested services are necessary "to assist a child with a disability to benefit from special education").

[7] "Speech-language pathology services" are also "related services" that school districts must provide to qualifying children and discuss in a qualifying child's IEP. 20 U.S.C. 1401(26)(A) (requiring school districts to provide "'related' * * * supportive services (including speech-language pathology services)" if the requested services are necessary "to assist a child with a disability to benefit from special education"); see also *supra* note 6. The dispute between the parties over speech therapy and one-on-one instruction concerned whether the sixty minutes of speech therapy offered by respondent and the group instruction used in respondent's special education classroom were each "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; see also Pet. App. 16a-21a.

[8] Although not listed among IDEA's examples of "related services," music therapy is, nonetheless, a "related service[]" that a school district must provide if necessary "to assist a child with a disability to benefit

Pet. Mot. S.J. at 8-15. On June 2, 2005, the district court granted judgment on the pleadings for respondent, essentially affirming the decisions of the IHO and SLRO. See Pet. App. 23a. Petitioners timely appealed.

Shortly before petitioners appealed, the Sixth Circuit decided *Cavanaugh v. Cardinal Local School District*, 409 F.3d 753 (CA6 2005). In that case, the Sixth Circuit held that non-lawyer parents of a disabled child may not proceed *pro se* in a federal court action brought pursuant to IDEA. *Id.* at 757-58. The Sixth Circuit explained that "pro se means to appear on one's own behalf * * * not * * * on another person's behalf in the other's cause of action." *Id.* at 755. The Sixth Circuit reasoned that "the right of [a] disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents" because, as it explained in *Barnett v. Memphis City Schools*, 113 Fed. Appx. 124 (CA6 2004), "the intended beneficiary of the IDEA is not the parents of the individual with a disability, but the disabled individual." 409 F.3d at 757. The court recognized that "IDEA does grant parents of disabled students a narrow set of procedural rights" but stated that those "procedural rights exist only to ensure that the child's substantive right to a FAPE is protected." *Ibid.* It therefore concluded that "any right on which the [parents] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent on the [parents] proceeding, through counsel, with their appeal on [their child's] behalf." *Ibid.*

---

from special education." 20 U.S.C. 1401(26)(A); see also *supra* notes 6 & 7. The dispute between the parties over music therapy concerned whether Jacob needed music therapy to "receive educational benefits." Pet. App. 21a-22a.

After petitioners' appeal was docketed,[9] respondent filed on July 14, 2005, a motion invoking *Cavanaugh* and seeking dismissal of the appeal because petitioners were proceeding *pro se*. BIO App. 18b-32b. On November 4, 2005, the court of appeals ordered petitioners' entire appeal dismissed unless petitioners retained counsel within 30 days. Pet. App. 1a-2a. Relying on *Cavanaugh* and its order in petitioners' preliminary injunction appeal, the Sixth Circuit stated that "Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claims *pro se*." Pet. App. 1a (citing *Cavanaugh*, 409 F.3d at 756-57).

On December 2, 2005, Justice Stevens stayed the Sixth Circuit's November 4, 2005, order, "pending the timely filing and disposition by this Court of a petition for a writ of certiorari." Justice Stevens' order provided that, if certiorari is denied, the "stay will terminate automatically fifteen days after the date of the order denying certiorari," or if certiorari is granted, the stay will terminate "upon the sending down of the judgment of this Court."

This Court granted certiorari on October 27, 2006. 127 S. Ct. 467.

---

[9] Petitioners had filed a previous interlocutory appeal challenging the district court's denial of a preliminary injunction regarding Jacob's "stay put" placement at Monarch. See *Winkelman v. Parma City Sch. Dist.*, 166 Fed. Appx. 807, 808 (CA6 2006). Relying on *Cavanaugh*, the Sixth Circuit on September 20, 2005, ordered dismissal of that appeal unless petitioners retained counsel within 30 days. BIO App. 2b-4b (citing *Cavanaugh*, 409 F.3d at 756-57). In response to the Sixth Circuit's order, we volunteered to represent petitioners *pro bono*. *Id.* at 5b-7b. On January 25, 2006, the Sixth Circuit affirmed the denial of the preliminary injunction on the merits. See *Winkelman*, 166 Fed. Appx. at 808-11. Petitioners did not seek further review of that decision, which is not implicated here.

SUMMARY OF ARGUMENT

The question in this case is to what extent non-lawyer parents of a disabled child, like Jacob's parents, may litigate an IDEA dispute in federal court *pro se*. The answer is "without limitation."

In § 35 of the Judiciary Act of 1789, 28 U.S.C. 1654, Congress provided that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." Congress created a private right of action for judicial review of IDEA disputes when it provided that "[a]ny party aggrieved by the findings and decision" of an administrative-level hearing officer may bring suit in federal court. 20 U.S.C. 1415(i)(2)(A).

On a plain reading of this provision – as confirmed by IDEA's text and Congress' intent in enacting it, Congress intended to make parents of a disabled child real parties in interest to IDEA actions, such that they are entitled under the general federal rule embodied in 28 U.S.C. 1654 to bring an IDEA action *pro se*. This is the case regardless whether the claims the parent asserts allege a denial of the statutory substantive right to a free appropriate education or a violation of one of IDEA's procedural safeguards.

In IDEA cases, federal courts review the outcomes and procedures employed during administrative due process hearings, which Congress specifically required to be exhausted as a precondition to suit. 20 U.S.C. 1415(l). Congress repeatedly acknowledged that parents would be the party to initiate the administrative process through its various provisions acknowledging that parents would typically file the initial due process complaint. *E.g.*, 20 U.S.C. 20 U.S.C. 1415(b)(6)(B).

Congress further required, as a condition precedent to suit, that in states with two-tier systems, like Ohio, "any party aggrieved" by the findings or procedures employed during the initial due process hearing exhaust the second level of review. 20 U.S.C. 1415(g)(1). Because Congress employed the same "any party aggrieved" language in both IDEA's right-to-sue provision and IDEA's provision governing second-tier administrative review, the two provisions must be accorded the same meaning – namely that parents may continue to press their own right of action. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

IDEA's provisions prohibiting challenges to the qualifications of educational agency personnel and conferring jurisdiction to award attorneys' fees confirm that parents are real parties in interest with their own right of action in federal court. These provisions refer, respectively, to "the right of action that a parent * * * may maintain," *e.g.*, 20 U.S.C. 1401(10)(E), and to "a prevailing party who is the parent," *e.g.*, 20 U.S.C. 1415(i)(3)(A).

In providing parents with their own right of action, Congress did not intend to limit it to only procedural claims. In fact, Congress conferred on parents their own right to ensure that the statutory substantive right to a free appropriate education (FAPE) was provided to their child. This is manifest primarily in IDEA's repeated expressions of congressional intent to provide an appropriate education to disabled children "at no cost to parents." *E.g.*, 20 U.S.C. 1401 (29). It is confirmed by IDEA's numerous provisions granting parents extensive rights of involvement in shaping the individualized educational plan designed to provide their disabled child the services he or she requires and advocating for the child throughout the administrative process. See, *e.g.*, *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999) (looking to IDEA's "overall statutory scheme" to interpret its provisions)

Even if the substantive statutory right to a FAPE belonged only to the disabled child, IDEA cases are appropriate in which to allow parental *pro se* representation. Unlike other contexts in which the common law ban on lay third-party representation has been prohibited, IDEA cases affect rather parents and children whose interests are perfectly aligned. In IDEA cases, parents have a concrete stake in the issue because of their financial responsibility for the child and the financial effect on them of a denial of benefits.

Moreover, parents of disabled children are permitted to and often do represent their children in the administrative process that must be exhausted before seeking judicial review. Once administrative remedies have been exhausted, the cases involve administrative record review and little new fact-finding. And because parents are often unable to find counsel, a ban on parental representation would jeopardize both the child's statutory right to judicial review of adverse decisions and result in forfeiture of the very benefits that are intended to aid children during their childhood and, therefore, must be timely provided.

ARGUMENT

The court of appeals erred when it held that "Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claims *pro se*." Pet. App. 1a.

I. PARENTS MAY LITIGATE IDEA CASES *PRO SE* UNDER 28 U.S.C. 1654 BECAUSE THEY ARE REAL PARTIES IN INTEREST IN SUCH CASES

This Court has recognized repeatedly that parents of a disabled child are among those who may file a civil action under IDEA, see *Honig v. Doe*, 484 U.S. 305, 312 (1988) ("At the conclusion of [a due process] hearing, both the

parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state or federal court."); *School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 361 (1985) (noting "the right of the parents * * * to challenge in administrative and court proceedings a proposed IEP with which they disagree"), but it has not yet recognized that parents may do so *pro se*.

In § 35 of the Judiciary Act of 1789, 28 U.S.C. 1654, Congress provided that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." Congress created a private right of action for judicial review of IDEA disputes when it provided that "[a]ny party aggrieved by the findings and decision" of an administrative-level hearing officer may bring suit in federal court. 20 U.S.C. 1415(i)(2)(A). Because parents of a disabled child are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) when they bring a civil action either to seek relief for a substantive violation of the statutory right to a FAPE or to enforce procedural rights under IDEA, they are entitled under the general federal rule embodied in 28 U.S.C. 1654 to proceed *pro se* in a federal court action under IDEA.

Statutory language is the starting point in any case of statutory construction, *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004), and should be given its most natural reading, *Rousey v. Jacoway*, 544 U.S. 320, 330 (2005). This Court has stressed repeatedly that, in performing a textual analysis, the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. United States*, 126 S. Ct. 1252, 1257 (2006); *see also Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) ("Statutory construction is a 'holistic endeavor.'" (citations omitted)); *Leocal*, 543 U.S. at

9 ("[T]he Court construes language in its context and in light of the terms surrounding it.").[10]

---

[10] The Spending Clause is inapplicable to this case but, even if it was, this Court's analysis and the result it reaches should be the same. A parent's right to sue *pro se* for an IDEA violation derives from 28 U.S.C. 1654, which is not Spending Clause legislation. The question how an IDEA case may be litigated in federal court does not implicate the Spending Clause's concerns about whether a state official "engaged in the process of deciding whether the State should accept IDEA funds [has] * * * clear notice regarding the [State's] liability," any "'federally imposed conditions'" on the receipt of IDEA funds, or other "obligations that go with those funds." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006) (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). A State's liability and fiscal obligations are independent of the question of federal court procedure at issue here. To this end, the issue in this case differs markedly from the questions in *Schaffer* and *Murphy*, which involved, respectively, how States administer and conduct the administrative-level proceedings that IDEA obligates them to provide or whether States may be liable to compensate prevailing parents for expert fees. Moreover, because civil litigants have been able to sue *pro se* since Congress included what is now section 1654 as § 35 of the Judiciary Act of 1789, states have long had notice that they may have to oppose *pro se* litigants.

Neither respondent's speculative concern about *pro se* parents filing "'poorly drafted, inarticulate, or vexatious claims,'" BIO at 16 (quoting *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (CA3 1998)), nor its concern about its "and its taxpayers' * * * right to an efficient and timely resolution to * * * legal proceedings," *id.* at 30, implicates the Spending Clause. IDEA's implementing regulations make clear that IDEA funds "may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 [20 U.S.C. 1415] of the Act." 34 C.F.R. 300.517(b)(1). Indeed, upon § 300.517(b)(1)'s original promulgation, the Department of Education explained that "the limited Federal resources under this Act should be used to provide special education and related services and not be used to promote litigation of disputes." 64 Fed. Reg. 12406, 12615 (1999). Whatever the efficiency and duration of IDEA actions – and the costs of defending such actions – they do not relate to the bargain struck by States when they agree to receive IDEA funds, because receipt of those funds is totally unrelated to the in-court litigation obligations of a State or local school district.

In any event, even if the Spending Clause was applicable to this case, it would not affect the result. Nothing in *Murphy* – nor any of the Court's

Contrary to the Sixth Circuit's conclusion "that the right * * * to a FAPE belongs to the child alone" and that "any [procedural] right on which the [parents] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE," *Cavanaugh*, 409 F.3d at 757, "[o]n a plain reading" of IDEA's text – and confirmed by its structure, purposes, and legislative history – parents have both their own procedural rights under IDEA and their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE. *Maroni v. Pemi-Baker Reg'l Sch.*, 346 F.3d 247, 251 (CA1 2003). Consequently, parents are real parties in interest in IDEA actions, not merely guardians of their children's rights, and *ipso facto* have a right under 28 U.S.C. 1654 to proceed *pro se* on such IDEA claims.[11]

---

prior Spending Clause precedents – indicates that the Spending Clause is an independent interpretive lens through which to read a statute. Rather, the Spending Clause simply amplifies why a statute should be interpreted according to its plain meaning. And "[o]n a plain reading" of IDEA, as discussed above, the court of appeals' judgment should be reversed. *Maroni v. Pemi-Baker Reg'l Sch.*, 346 F.3d 247, 251 (CA1 2003).

[11] Thus, this Court need not necessarily decide, as respondent has suggested, whether parents can "proceed *pro se* on behalf of their children." BIO 13. That issue, which is addressed, *infra*, in Part II of this brief, would be implicated only if the Court finds either that parents do not have their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE, see *Cavanaugh*, 409 F.3d at 757 (holding that IDEA's "guarantee of a FAPE is [not] a right that [a child] shares jointly with his parents"); *Collinsgru*, 161 F.3d at 232-37 (same), or that parents' procedural rights under IDEA are derivative of their child's substantive right to a FAPE, see *Cavanaugh*, 409 F.3d at 757 ("[A]ny right on which the [parents] could proceed on their own behalf would be derivative of their [child]'s right to receive a [free appropriate public education], and wholly dependent upon the [parents] proceeding, through counsel, with their appeal on [their child's] behalf.").

A. Congress Viewed Parents as "Parties Aggrieved" by Adverse Administrative Decisions and, Therefore, Real Parties In Interest to IDEA Suits

Congress used the phrase "[*a*]*ny party aggrieved* by the findings and decision * * * with respect to [an administrative] complaint" to define those entitled to bring a civil action under IDEA. 20 U.S.C. 1415(i)(2)(A). This Court has explained that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly." *FEC v. Akins*, 524 U.S. 11, 19 (1998); see also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-09 (1972) (holding that the term "aggrieved person" in § 810(a) of the Fair Housing Act demonstrated congressional intent to confer standing to the fullest extent permitted by Article III). A person is "aggrieved" if he or she has "legal rights that are adversely affected" or has "been harmed by an infringement of legal rights." *Black's Law Dictionary* 73 (8th ed. 2004).

1. Parents are real parties in interest to the administrative-level proceedings that must be exhausted as a condition precedent to suit

In IDEA cases, federal courts review the outcomes of and procedures employed during administrative due process hearings. Congress required as a condition precedent to bringing suit in court that such administrative remedies be exhausted,[12] see 20 U.S.C. 1415(l) ("[T]he procedures under

---

[12] There are, of course, exceptions to the requirement that administrative remedies be exhausted. See *Honig*, 484 U.S. at 327 ("[J]udicial review is normally not available under § 1415(e)(2) [the former judicial review provision] until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate.").

subsections (f) and (g) shall be exhausted."), and it is indisputable that parents have the right to exhaust those administrative remedies (and to do so *pro se*), see 20 U.S.C. 1415(h)(2)).[13] Indeed, Congress specifically acknowledged in both IDEA's text and its legislative history that *parents* – not their minor children – would be the parties that file administrative complaints.

For example, IDEA's statute of limitations for administrative complaints is limited to events occurring "not more than 2 years before the date the *parent* or public agency knew or should have known about the alleged action that forms the basis of the complaint." 20 U.S.C. 1415(b)(6)(B) (emphasis added). Section 1415(b)(8) "require[s] the State educational agency to develop a model form to assist *parents* in filing a complaint and due process complaint notice." (Emphasis added). Section 1415(c)(2)(B) requires school districts, upon receiving a "*parent's* due process complaint notice," to respond to it within ten days. (Emphasis added).

---

[13] While a parent has "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities" at due process hearings, 20 U.S.C. 1415(h)(1), parents are *discouraged* from having counsel accompany them to IEP meetings. See 34 C.F.R. Part 300, App. A ("The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at an IEP meeting."). The Sixth Circuit's reading of the statute would result in a sequence in which parents would be permitted but discouraged from employing counsel at an IEP meeting, permitted to employ counsel at the administrative level, but required to employ counsel in court. Cf. *Maroni*, 346 F.3d at 256-57 ("It would be odd for Congress to exclude parents from the definition of 'parties aggrieved' as to substantive claims, and thus force them to find attorney representation at the federal court level, after giving parents such a strong role at every other stage of the process."). That sequence would be odd in any administrative law regime but is particularly bizarre under IDEA, where courts largely conduct record review and, unlike Title VII or Prison Litigation Reform Act cases, do not adjudicate *de novo*. See *infra* Part III.

Likewise, § 1415(d)(2) requires that, "upon * * * the filing of a complaint," educational agencies provide "a full explanation of the procedural safeguards, written in the native language of the *parents*." (Emphasis added). Once the complaint is filed, "the *parents* or the local education agency involved shall have an opportunity for an impartial due process hearing." 20 U.S.C. 1415(f)(1) (emphasis added)); see also 20 U.S.C. 1415(e)(2)(A)(ii) (ensuring that IDEA's mediation process "is not used to deny or delay a *parent's right* to a due process hearing" (emphasis added)), (k)(3)(A) ("The *parent* of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing." (emphasis added)).

IDEA's legislative history is entirely consistent with the understanding that parents will be the parties to exhaust IDEA's administrative remedies before filing suit. The Senate Committee on Labor and Human Relations, in reporting on proposed attorneys' fees amendments to the statute, explained that "[u]nder the EHA *parents* must generally exhaust administrative remedies to attempt to resolve certain disagreements before filing a civil court action." S. Rep. No. 99-112, at 15 (1985) (emphasis added). Similarly, the House Committee on Education and Labor explained that "Congress, by establishing a comprehensive scheme of procedural protections under EHA * * * expected that in appropriate situations these procedures would be used before a *parent* or guardian filed a law suit [sic]." H.R. Rep. No. 99-296, at 4 (1985) (emphasis added); *see also id.* at 7 ("Typically, a *parent* is required to exhaust administrative remedies where complaints involve the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." (emphasis added)).

Having made parents the "party" in interest in administrative hearings under the Act, it follows that Congress also considered parents to be a "party aggrieved by the findings and decision" resulting from those very same administrative hearings. Indeed, it would be absurd if the parents who are explicitly expected to exhaust administrative remedies as a condition precedent to initiating a civil action could not be parties for purposes of that civil action. See *Nixon v. Missouri Mun. League*, 541 U.S. 125, 144 (2004) (observing that the Court's task is to interpret statutes "in light of the purposes Congress sought to serve while avoiding 'absurd results'"). "Because the statute enables parents to request due process hearings, they are parties to such hearings and thus are logically within the group of 'parties aggrieved' given the right to sue." *Maroni*, 346 F.3d at 251; see also *Collinsgru*, 161 F.3d at 236-39 (Roth, J., dissenting).[14]

2. Parents are "parties aggrieved" under § 1415(g)(1) when they administratively appeal the results of a due process hearing in two-tier systems

That parents are real parties in interest in IDEA cases is "buttressed" by the provisions of IDEA that allow appeals to

---

[14] Indeed, courts "almost uniformly permitted parents to sue pro se under the predecessor statute to IDEA, the Education for All Handicapped Children Act (EHA)." *Maroni*, 346 F.3d at 250 (citing, *inter alia*, *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307 (CA9 1987); *Rettig v. Kent City Sch. Dist.*, 788 F.2d 328 (CA6 1986); *Kruelle v. New Castle Co. Sch. Dist.*, 642 F.2d 687, 690 & n.4 (CA3 1981) (allowing parents to proceed *pro se*, without discussion, in case challenging provision of FAPE to their disabled son under the EHA; noting without discussion that "20 U.S.C. § 1415(e)(2) provides that any party aggrieved by an agency decision shall have the right to bring a civil action * * * in a district court")).

the state educational agency in two-tier systems like that employed in Ohio.[15] *Maroni*, 346 F.3d at 251. Congress mirrored the "any party aggrieved" language in IDEA's right-to-sue provision (§ 1415(i)(2)(A)), when it provided that "any party aggrieved by the findings and decision rendered" in a due process hearing conducted by a local education agency "may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). Parents – as the principal parties initiating due process hearings under the Act – are unquestionably "part[ies] aggrieved" for purposes of filing an administrative appeal, as numerous courts have recognized. See *Maroni*, 346 F.3d at 251-52 (citing *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59 (CA1 2002)); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1064 (CA10 2002); *Board of Educ. v. Kelly E. ex rel. Nancy E.*, 207 F.3d 931, 935 (CA7 2000).

3. Congress' use of the same "parties aggrieved" language in granting both the right to administrative appeal under § 1415(g)(1) and the right to sue under § 1415(i)(2)(A) requires that the term be given consistent meaning

Under the "normal rule of statutory construction," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[I]dentical words used in different parts of the same act are intended to have the same meaning." (quoting *Department of*

---

[15] States have "one-tier" or "two-tier" systems for due process hearings. In one-tier systems, the state department of education conducts the due process hearing and the losing party can appeal directly to state or federal court. 20 U.S.C. 1415(i)(2)(A). In two-tier systems, the due process hearing is conducted by the school district. The losing party must appeal to the state department of education, which appoints a review officer or review panel. 20 U.S.C. 1415(g)(1), (i)(2)(A). After the review officer or panel issues a decision, the losing party may appeal to state or federal court. 20 U.S.C. 1415(i)(2)(A). Ohio employs a two-tier system.

Revenue v. ACF Indus., Inc., 510 U.S. 332, 342 (1994))), Congress' use of the same broad reference to "any party aggrieved" in the provisions governing both administrative appeals (§ 1415(g)) and civil actions challenging the outcome of administrative appeals (§ 1415(i)(2)(A)) requires that the two provisions "be accorded a consistent meaning," *National Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501 (1998) (applying the "established canon of construction that similar language within the same statutory section must be accorded a consistent meaning"); see also *NASA v. Federal Labor Relations Auth.*, 527 U.S. 229, 235 (1999) (observing that phrase "should ordinarily retain the same meaning wherever used in the same statute"); *Mertens v. Hewitt*, 508 U.S. 248, 260 (1993) ("[L]anguage used in one portion of a statute * * * should be deemed to have the same meaning as the same language used elsewhere in the statute."); *Sorenson v. Secretary of Treas.*, 457 U.S. 851, 860 (1986) ("[I]dentical words used in different parts of the same act are intended to have the same meaning."); 2A Norman J. Singer, *Sutherland Statutes & Statutory Construction* § 47.16 (rev. 6th ed. 2000) ("Where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute."). If parents are "parties aggrieved" by due process hearings when seeking to appeal to a state administrative agency, then as a matter of statutory construction, they must also be parties aggrieved by due process hearings when seeking judicial review – aside from the logical reasons discussed above why this must be the case.

The Sixth Circuit, in concluding that parents cannot be "parties aggrieved" with a right to sue under § 1415(i)(2)(A), see *Cavanaugh*, 409 F.3d at 757 ("We have considered, and reject, the reasoning of the First Circuit in *Maroni*."), has simply ignored Congress' use of the same "parties aggrieved" language in both § 1415(g)(1) and § 1415(i)(2)(A) and the fact that Congress fully intended

parents to be parties to the administrative proceedings that must be exhausted before filing suit. It has not – and cannot – explain away the persuasive force of the parallelism between these two provisions.

4. Congress had no need to single-out parents from the collective group of "parties aggrieved" in § 1415(i)(2)(A) to make them real parties in interest

In concluding that parents cannot be "parties aggrieved" with a right to sue under § 1415(i)(2)(A), the Sixth Circuit also relied on the Third Circuit's decision in *Collinsgru* – a divided decision – which reasoned that, because IDEA contains a provision allowing parties to proceed in the administrative level without an attorney, see 20 U.S.C. 1415(h), but contains no comparable provision pertaining to court actions, Congress did not intended the term "party aggrieved" to include parents. *Cavanaugh*, 409 F.3d at 757. Congress did explicitly say that parents could bring due process hearings without a lawyer, and so, according to the Third and Sixth Circuits, the rule of *expressio unius est exclusio alterius* means that Congress did not intend parents to be able to sue *pro se*. *Cavanaugh*, 409 F.3d at 756; *Collinsgru*, 161 F.3d at 232.

But the *expressio unius* canon, which is of limited force to begin with, see *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003), is inapplicable here. Congress' omission of parents from § 1415(i)(2)(A) reveals nothing about whether Congress intended to authorize parents to proceed *pro se* in federal court. Congress had no need to address the issue in that provision because – unlike the situation with respect to IDEA *State*-run administrative proceedings – another *federal*

statute (28 U.S.C. 1654) already provided parties the right to pursue their own claims *pro se* in federal lawsuits.[16]

Moreover, in crafting the right-to-sue provision, Congress needed to include several categories of plaintiffs – school districts, parents, and children – and, therefore, used a collective term. For example, IDEA does not refer to "child aggrieved" as it easily could if only the child could sue. Nor does § 1415(i)(2)(A) refer to school districts, even though they are may – and do – seek review under it. See, *e.g.*, *Manchester Sch. Dist. v. Crisman*, 306 F.3d 1, 4 & n.3 (CA1 2002) (reviewing a federal civil suit by a school district under 20 U.S.C. 1415(i)(2)(A)). Accordingly, the only plausible explanation for IDEA's use of the term "party aggrieved" instead of "parents" is that Congress sought to confer the right to judicial review of administrative-level proceedings upon all parties involved: school districts, parents, and children.

---

[16] For similar reasons, the Third and Eleventh Circuit's observation that while "parents have the right to present evidence and examine witnesses in due process hearings * * * there is no indication that Congress intended to carry this requirement over to federal court proceedings," *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 582 (CA11 1997) (citing 20 U.S.C. 1415(d)(2) (1997) (current version at 20 U.S.C. 1415(h)(2))), cert. denied, 522 U.S. 1110 (1998); see also *Collinsgru*, 161 F.3d at 235-36, is of no moment. In discussing how a court should adjudicate IDEA cases, Congress provided that "the court * * * shall hear additional evidence at the request of a party," 20 U.S.C. 1415(i)(2)(C), which simply begs the antecedent question whether parents are "a party."

5. IDEA's provisions prohibiting challenges to the qualifications of educational agency personnel and conferring jurisdiction to award attorneys' fees confirm that parents are real parties in interest

In addition to IDEA's grant to parents of a cause of action under § 1415(i)(2)(A)'s right-to-sue provision, both IDEA's provisions prohibiting challenges to the qualifications of educational agency personnel and provisions conferring jurisdiction to award attorneys' fees confirm that parents are real parties in interest.

In §§ 1401(10)(E) and 1412(a)(14)(E), Congress prohibited a "right of action" "for the failure of a particular * * * educational agency employee to be highly qualified."[17] In doing so, however, Congress confirmed that parents are real parties in interest with a "right of action," by explaining that its prohibition on challenges to the qualifications of personnel applies "[n]otwithstanding any other individual right of action that a *parent* or student may maintain under this subchapter." 20 U.S.C. 1401(10)(E), 1412(a)(14)(E).

The attorneys' fee provisions of IDEA also confirm that Congress viewed parents as real parties in interest who may pursue in court claims that their child was denied a FAPE or that their own or their child's procedural rights were violated. IDEA allows "the district courts of the United States" "[i]n any action or proceeding brought under this section," to "award reasonable attorneys' fees * * * *to a prevailing party who is the parent* of a child with a disability."[18] 20 U.S.C.

---

[17] At minimum, a "highly qualified" teacher must have an undergraduate degree and be certified or licensed by the State. Additional requirements vary depending on the level and curricula they teach. 20 U.S.C. 1401(10)(B)-(D).

[18] In *Collinsgru*, the Third Circuit rejected the plaintiffs' argument that the IDEA's attorneys' fees provisions showed that "an IDEA suit is the parents' own case for 28 U.S.C. 1654 pro se representation purposes,"

1415(i)(3)(A), (B)(i)(I) (emphasis added);[19] see also *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1026 (CA9 2000) (holding in action to recover attorneys' fees that "[w]hen a *parent* obtains affirmative relief in a proceeding brought under IDEA, the *parent* is the 'prevailing party.'" (emphasis added)).

IDEA also prohibits a court from awarding attorneys' fees in "any action or proceeding under this section for

---

because, in its view, "it is just as logical to read this language simply as a reference to the procedural cases in which parents clearly have standing as parties." 161 F.3d at 234. The more logical reading of § 1415(i)(3), however, is that it applies to appeals of decisions rendered in administrative hearings on substantive as well as procedural issues: Section 1415(i)(3)(B) makes clear that the attorneys' fees provisions apply "[i]n any action or proceeding brought under this section," *i.e.* § 1415. 20 U.S.C. 1415(i)(3)(B)(i). The "action[s] or proceeding[s]" provided for in § 1415 include due process hearings, 20 U.S.C. § 1415(f)(1)(A) (parents have the right to a due process hearing regarding complaints they file under subsection (b)(6)), as well as court-appeals from decisions rendered in those hearings, 20 U.S.C. 1415(i)(2)(A) (any "party aggrieved" by a decision made under subsection (f) may bring a civil action with respect to the complaint presented "pursuant to this section"). Thus, the attorneys' fees provisions' reference to parents as "parties" to all actions under § 1415 necessarily includes actions brought in court.

[19] The pre-2004 version of the § 1415(i)(3)(B) authorized the award of attorneys' fees "to the parents of a child with a disability who is the prevailing party." 20 U.S.C. 1415(i)(3)(B) (2000). That provision, however, does not affect other provisions recognizing that parents may be a prevailing party, because the fact is that either parents or children, or both, may be prevailing parties under IDEA. See *Maroni*, 346 F.3d at 252 (noting that the pre-2004 version of 20 U.S.C. 1415(i)(3)(B) "suggests parents are aggrieved parties who bear the costs and benefits of a successful suit" and that the pre-2004 version of 20 U.S.C. 1415(i)(3)'s "dual usage undercuts any argument that the attorneys' fees provision requires the term 'party aggrieved' to exclude parents"). In any event, in 2004, Congress amended § 1415(i)(3)(B) to provide for attorneys' fees "to the prevailing party who is the parent of a child with a disability." 20 U.S.C. 1415(i)(3)(B)(i)(I).

services performed subsequent to the time of a written offer of settlement to a *parent*" if, in addition to other conditions, "the relief finally obtained *by the parents* is not more favorable *to the parents* than the offer of settlement." 20 U.S.C. 1415(i)(3)(D)(i), (D)(i)(III) (emphasis added). That prohibition, however, is tempered by language reiterating that parents may be prevailing parties under IDEA, insofar as Congress allowed a district court to award attorneys fees to "a *parent who is the prevailing party* and who was substantially justified in rejecting the settlement offer," even if the parent fails to obtain relief greater than the rejected settlement. 20 U.S.C. 1415(i)(3)(E) (emphasis added). Similarly, if "the parties" reach a settlement during one of IDEA's voluntary mediation or resolution sessions, their settlement "shall * * * [be] signed by both the *parent* and a representative agency * * * [that is] enforceable * * * in a district court of the United States." 20 U.S.C. 1415(e)(2)(F), (f)(1)(B)(iii) (emphasis added).[20] If the child were the only real party in interest, it would be strange for Congress to focus so specifically on the relief obtained "by the parents." *Ibid.*

The 2004 amendments to IDEA's attorneys' fee provisions reaffirm this reading.[21] In addition to clarifying

---

[20] While Congress presumably assumed that parents would oversee litigation involving the rights of their children and so might be the target of settlement offers in that context, the repeated focus on the rights of the parents, here and throughout the statute, indicates that the parents enjoy more than merely derivative rights.

[21] The 2004 amendments govern the question presented. Those amendments took effect on July 1, 2005, see Pub. L. No. 108-446, § 302(a)(1), 118 Stat. 2803, before petitioners filed this appeal with the Sixth Circuit. JA 7, 9. Thus, the statute as amended in 2004 was the version in effect at the time of the proceedings in the court of appeals. Contrast *Schaffer*, 126 S. Ct. at 532 (applying pre-2004 version of IDEA because that version "was in effect during the proceedings below"). There was no reason not to give that provision immediate effect in pending cases. Under *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280

parents' prevailing party status in § 1415(i)(3)(B)(i)(I), see *supra* note 19, the 2004 amendments provide that parents and/or their attorneys – notably, not a child or a child's attorney – may be liable for attorneys' fees when they (1) pursue a "cause of action that is frivolous, unreasonable, or without foundation," (2) "continue[] to litigate after the litigation clearly became frivolous, unreasonable, or without foundation," or (3) pursue a "cause of action * * * for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. 1415(i)(3)(i).[22]

(1994), a statute operates retroactively only if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Respondent* surely cannot claim any of its interests are implicated. The opposing party would hardly seem to have a vested interest in precluding the other party from proceeding *pro se*. See *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2432 n.10 (2006) (defining "vested rights" as "a term that describes something more substantial than inchoate expectations and unrealized opportunities"). Nor is applying this rule to pending cases a retroactive application at all because the relevant event for judging retroactivity is a party's ongoing self-representation prospectively. See *id.* at 2433 (rejecting retroactivity challenge to "application of new law to continuous[] * * * action"); *Landgraf*, 511 U.S. at 290-293 (Scalia, J., concurring); cf. *Martin* v. *Hadix*, 527 U.S. 343, 360-361 (1999) (applying attorneys' fees limitations of PLRA in pending cases to legal services provided after effective date of the Act). Thus, applying the 2004 amendments is consistent with *Landgraf*. In any event, the 2004 amendments did not change the law with respect to *pro se* representation because, for the reasons explained above, parents enjoyed the right to proceed *pro se* in federal court under the version of IDEA prior to 2004.

[22] As amended in 2004, the statute authorizes an award of attorneys' fees

> (I) to a *prevailing party who is the parent* of a child with a disability;
>
> (II) to a prevailing party who is a State educational agency or local educational agency against the *attorney of a parent* who files a complaint or subsequent cause of action that is frivolous,

The Court should, therefore, reject the Sixth Circuit's contrary reading, which would require the Court to simultaneously "rewrite the statute," *Honig*, 484 U.S. at 323 (declining the California Superintendent of Public Instruction's invitation to read a dangerousness exception into the disciplinary section of IDEA where no exception was included by Congress and the statute is clear on its face), and deprive parents of their right to litigate their own cases *pro se* under 28 U.S.C. 1654.

---

unreasonable, or without foundation, or against the *attorney of a parent* who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against *the attorney of a parent*, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

20 U.S.C. 1415(i)(3)(B)(i) (emphasis added). In addition, with limited exceptions, the current version of IDEA mandates that a court reduce the amount of attorneys' fees if:

(i) the parent, or the *parent's attorney*, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy; [or]

* * * * *

(iv) the *attorney representing the parent* did not provide to the local educational agency the appropriate information in the notice of the [administrative] complaint.

B. Parents Are Real Parties in Interest Regardless Whether They Bring Claims Alleging Violations of IDEA's Substantive Right to a FAPE or Procedural Safeguards

Parents have both procedural rights under IDEA and their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE. When any of those rights is violated, the parents themselves are "parties aggrieved" and real parties in interest to any suit to vindicate those rights. Accordingly, when parents bring a claim challenging the denial of IDEA's substantive statutory right to a FAPE, they are not bringing that claim "on behalf of their child," as some courts have erroneously held in denying parents the opportunity to litigate those claims *pro se*. See *Mosely v. Bd. of Educ.*, 434 F.3d 527, 532, 535 (CA7 2006) (holding that parents may proceed *pro se* on their own procedural claims under IDEA but must retain counsel if they wish to pursue IDEA claims on behalf of their child); *Collinsgru*, 161 F.3d at 227, 232-36 (same); *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124-26 (CA2 1998) (per curiam) (same), cert. denied, 526 U.S. 1025 (1999); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581-82 & n.17 (CA11 1997) (same), cert. denied, 522 U.S. 1110 (1998). Nor are parents' claims alleging violations of IDEA's procedural safeguards merely derivative of the rights guaranteed for their children, as the Sixth Circuit erroneously held in *Cavanaugh*, 409 F.3d at 757, because that conclusion rests on the faulty premise that parents do not enjoy their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE.

1. Parents have their own right to ensure that their child is receiving IDEA's statutorily-guaranteed FAPE

Although parents of a child with a disability enjoy several procedural rights under IDEA,[23] see *Schaffer*, 126 S. Ct. at 532 (noting several examples), parents also have a substantive right under IDEA to a *free* appropriate public education for their child.[24] For example, in enacting IDEA, Congress found that, "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, [IDEA] has been successful in ensuring children with disabilities and *the families of such children access to a free appropriate public education.*" 20 U.S.C. 1400(c)(3) (emphasis added). Congress similarly recognized that denial of a FAPE adversely affects not just the child with a disability but also his or her family. See 20 U.S.C. 1400(c)(2)(D) (acknowledging that before EHA, "the educational needs of millions of children with disabilities were not being fully met because * * * a lack of adequate resources within the public school system forced *families* to find services outside the public school system." (emphasis added)).

---

[23] Where parents allege procedural violations at a due process hearing, the hearing officer may conclude that procedural inadequacies constituted a denial of the substantive guarantee of a free appropriate public education if he determines that the parents' opportunity to participate in the decision-making process was significantly impeded. 20 U.S.C. 1415(f)(3)(E)(ii).

[24] Indeed, implicitly recognizing that *lawyer*-parents litigating over the substantive right to a FAPE are effectively litigating for themselves, the circuits have universally held that § 1415(i)(3)(B) attorneys' fees are unavailable to them under *Kay v. Ehrler*, 499 U.S. 432 (1991). See *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1090-91 (CA9 2006); *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 603-04 (CA2 2006); *Woodside v. School Dist. of Philadelphia Bd. of Educ.*, 248 F.3d

Other provisions of the Act likewise emphasize that parents should not be required to bear the cost of educating their child with a disability. For example, the Act defines "free appropriate public education" to mean "special education and related services" that, among other things, are provided "at public expense" and "without charge," 20 U.S.C. 1401(9), and "special education" to mean "specially designed instruction, *at no cost to parents*, to meet the unique needs of a child with a disability," 20 U.S.C. 1401(29) (emphasis added); see also 20 U.S.C. 1412(a)(10)(B)(i) (requiring, under certain circumstances, that children with disabilities placed in private schools by public agencies be "provided special education and related services, in accordance with an [IEP], *at no cost to their parents*") (emphasis added).

To protect the right to a FAPE, Congress expressly authorized courts, under certain circumstances, to order local educational agencies "to reimburse the *parents*" for private school tuition.[25] 20 U.S.C. 1412(a)(10)(C)(ii) (emphasis added); see *also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) ("[P]ublic educational authorities who want to avoid reimbursing parents for the private placement of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate school in an appropriate private setting of the State's choice."). Such reimbursement was one of the forms of relief that petitioners sought in their federal court complaint. JA 19; Pet. App. 6a. The statute's

---

129, 130-31 (CA3 2001); *Doe v. Board of Educ. of Baltimore County*, 165 F.3d 260, 263, 264 (CA4 1998), *cert. denied*, 526 U.S. 1159 (1999).

[25] This right to reimbursement is not implied. Rather, it is an express codification of the Court's decision in *Burlington*, 471 U.S. at 370, recognizing that then § 1415(e)(2) (current version at 20 U.S.C. 1415(i)(2)(C)(iii)) authorized courts to award reimbursement as a form of "relief as the court determines is appropriate."

authorization of reimbursement *to parents* confirms that Congress viewed parents as real parties in interest when they challenge the denial of a free appropriate public education. Indeed, as Judge Wilkinson recognized for the Fourth Circuit, a disabled child would typically not have standing to seek reimbursement of private school expenses under IDEA because the child does not suffer any out-of-pocket loss as a result of attending private school. See *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299-300 (CA4 2005) (Wilkinson, J.) ("In the usual case, the parents of the disabled child will be the appropriate ones to seek reimbursement because they will have incurred the expense and suffered the subsequent monetary injury.").

Thus, by guaranteeing a FAPE and providing for reimbursement when a FAPE is denied, Congress sought to equalize the disparity between the families of non-disabled children who may rely on public education to avoid the costs of private school education for their children and "the families" of disabled children who, before IDEA, "were often forced to find services outside the public school system, often at great distance from their residence and at their own expense." 20 U.S.C. 1400(c)(2)(E) (2000). Whether compensatory or prospective, the financial relief provided by the guarantee of a FAPE inures to parents, is independent, and not merely derivative of the child's right to an appropriate public education.

The interpretation of parents as "parties aggrieved" and, therefore, real parties in interest who may litigate substantive claims *pro se* is reinforced by the structure of IDEA, which relies upon the central role played by parents in assuring that their disabled child receives a FAPE. See, *e.g.*, *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66, 73 (1999) (looking to IDEA's "overall statutory scheme" to interpret its provisions).

For example, IDEA provides for extensive parental involvement, *Schaffer*, 126 S. Ct. at 532 ("Parents and

guardians play a significant role in the IEP process."), in the "centerpiece" of the statute: the IEP, *Maroni*, 346 F.3d at 256; see also 20 U.S.C. 1401(9)(D) (listing "conformity with the [IEP]" as one of four components of a FAPE). Indeed, as the Court acknowledged in *Schaffer*, among other participatory guarantees (discussed *supra* at pp. 3-4), parents

> must be informed about and consent to evaluations of their child under the Act. § 1414(c)(3). Parents are included as members of "IEP teams." § 1414(d)(1)(B). They have the right to examine any records relating to their child, and to obtain an "independent educational evaluation of the[ir] child." § 1415(b)(1). [And t]hey must be given written prior notice of any changes in an IEP, § 1415(b)(3).

Schaffer, 126 S. Ct. at 532.

IDEA also contemplates that parents will act as advocates both throughout the IEP process and in due process hearings. Indeed, IDEA's implementing regulations discourage parents and school districts from bringing attorneys to IEP meetings. See 34 C.F.R. Part 300, App. A ("The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at an IEP meeting."). Similarly, at due process hearings, parents have the option of proceeding *pro se* or being accompanied by non-attorney "individuals with special knowledge or training with respect to the problems of children with disabilities." 20 U.S.C. § 1415(h)(1). Although IDEA grants parents the right to be accompanied by counsel at due process hearings, the presence of counsel is not required. *Ibid.*

These provisions for parental involvement are so central to IDEA's statutory scheme that when a child's parents are

not known or cannot be located, IDEA requires "assignment of an individual to act as a surrogate for the parents." 20 U.S.C. 1415(b)(2). Accordingly, as the First Circuit concluded, "it would be odd for Congress to exclude parents from the definition of 'parties aggrieved' as to substantive claims, and thus force them to find attorney representation at the federal court level, after giving parents such a strong role at every other stage of the process." *Maroni*, 346 F.3d at 256-57.

2. Neither IDEA's right-to-administrative-appeal provision (§ 1415(g)) nor right-to-sue provision (§ 1415(i)(2)(A)) limits the right of "parties aggrieved" to sue for a substantive violation

By requiring that the exhaustion of IDEA administrative remedies begin with the filing of a due process complaint, Congress necessarily contemplated that the complaint would frame the universe of claims eligible for any further administrative review under § 1415(g) or judicial review under § 1415(i)(2)(A). Indeed, IDEA specifically provides that "[a]ny party aggrieved * * * shall have the right to bring a civil action with respect to the *complaint* presented pursuant to this section." 20 U.S.C. 1415(i)(2)(A).

The complaint provision imposes no limit on the bundle of claims that a party may bring. To the contrary, it expressly provides that a party may complain about "*any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child." 20 U.S.C. 1415(b)(6)(A) (emphasis added). Thus, the claims to be presented in a complaint are the full panoply of claims that Congress intended to recognize as appropriate for administrative challenge, including both the substantive claim that the right to a FAPE has been denied and the procedural claim that a school district has failed to comply

with IDEA's procedural safeguards. And, as discussed *supra*, at Part I, Congress specifically acknowledged that parents may bring – and are real parties in interest to – such complaints.

Nor does the provision governing the right of parents to seek administrative-level appellate review (§ 1415(g)) or the provision governing the right of parents to seek judicial review (§ 1415(i)(2)(A)) narrow the bundle of claims to be reviewed or draw a distinction between substantive and procedural rights.[26] Section 1415(g)(2) prescribes State-level review "of the findings and decision appealed" from the due process hearing. Section 1415(i)(2)(A) prescribes judicial review "with respect to the complaint." It therefore follows that, if parents may pursue claims alleging the substantive denial of a FAPE at the administrative level, they should also be able to pursue the same substantive claims in court when they are aggrieved by the outcome of the administrative-level proceedings at which they initially presented that claim. See *Maroni*, 346 F.3d at 255.

---

[26] In drawing such a distinction, the Third Circuit in *Collinsgru* relied, *inter alia*, on a presumption against allowing parents to seek review regarding substantive claims based the rationale that implied rights of action are disfavored, and that allowing parents to proceed *pro se* on substantive claims is analogous to creating an implied right of action. 161 F.3d at 233-34. But Congress has already created an express right of action to seek review of administrative determinations under 20 U.S.C. § 1415(i)(2)(A). The issue is one of ordinary statutory interpretation: whether the term "parties aggrieved" in § 1415(i)(2)(A) applies to parents as well as children. No right of action is being implied and, hence, no presumption need be made concerning Congress's likely intent. Cf. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 70-71 (1992) (treating the issue as one of ordinary statutory interpretation where Congress has expressly created a remedy but the scope of the remedy is disputed).

II. EVEN IF ONLY THE CHILD POSSESSES THE SUBSTANTIVE STATUTORY RIGHT TO A FAPE, PARENTS SHOULD BE ABLE TO BRING THAT CLAIM *PRO SE*

The Sixth Circuit in prohibiting – and other courts in limiting – the opportunity of non-lawyer parents to bring an IDEA case *pro se* have mistakenly done so by relying on the common law principle that non-attorneys cannot represent the interests of another in court. Although it is certainly true that there exists such a general principle, see, *e.g.*, *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (CA1 1982) (collecting cases); *Guajardo v. Luna*, 432 F.2d 1324, 1325 (CA5 1970), it is not without exception – the most notable of which present situations materially indistinguishable from IDEA cases.

Lay representation has been permitted frequently in cases where the real party in interest lacks the ability to represent him or herself and otherwise might go without adequate representation, such as cases involving children from families insufficiently wealthy to afford a lawyer. For example, in *State v. Ritchie*, 757 P.2d 1247 (Idaho Ct. App. 1988), a fifteen-year-old facing two misdemeanor charges requested that the court allow his non-lawyer father to represent him as lay counsel. After recognizing the default rule that criminal defendants have no right to lay counsel, the court nonetheless permitted the defendant's non-lawyer father to represent him because

> [w]hen a minor lacks th[e] capability [to represent his or her interests in court to the same extent as an adult], the right of self-representation has little genuine meaning unless it is deemed to embrace the assistance of a parent or guardian. We see no cogent reason for imposing a blanket prohibition

> against such assistance. In fact, we surmise that many judges have allowed it.

Id. at 1250.

The reasoning of the *Ritchie* court is particularly appropriate in cases, like IDEA cases, where the policies against allowing lay representation are inapplicable or significantly outweighed by competing policies favoring lay representation. A prime example is the virtually indistinguishable context of non-lawyer parents seeking judicial review of their children's adverse Supplemental Security Income (SSI) disability decisions. The courts confronting that context have consistently held that non-lawyer parents may bring their children's claims *pro se*. See *Machadio v. Apfel*, 276 F.3d 103, 107 (CA2 2002); *Harris v. Apfel*, 209 F.3d 413, 416 (CA5 2000); *Maldonado v. Apfel*, 55 Supp. 2d 296, 308 (S.D.N.Y. 1999).[27]

Those circuits that have prohibited parents from proceeding *pro se* on what the courts construed as the children's IDEA claims almost exclusively rely on cases in which a non-lawyer parent attempted to litigate *pro se* some variety of a tort claim belonging to their child, see *Cavanaugh*, 409 F.3d at 754; *Collinsgru*, 161 F.3d at 231-32; *Wenger*, 146 F.3d at 125; *Devine*, 121 F.3d at 581.[28]

Those tort cases, in turn, rested on concerns that the choice whether to proceed *pro se* or with counsel "is not a true choice" for children if the choice is made by their

---

[27] *Rosario v. Apfel*, No. 96 Civ. 1227, 1998 WL 685173, *2 (S.D.N.Y. Sept. 30, 1998), reached a contrary conclusion but was expressly rejected by the Second Circuit in *Machadio*. 276 F.3d at 107.

[28] In holding that "a non-lawyer [parent] has no authority to appear as [his son's] legal representative" in an IDEA suit, *Navin v. Park Ridge Sch. Dist.* 64, 270 F.3d 1147, 1149 (CA7 2001), simply cited *Collinsgru*, 161 F.3d at 231, *Wenger*, 146 F.3d at 124-26, and *Devine*, 121 F.3d at 581-82.

parents, *Johns v. County of San Diego*, 114 F.3d 874, 877 (CA9 1997) (quoting *Osei-Afriye v. Medical College of Penn.*, 937 F.2d 876, 882-83 (CA3 1991) (in turn quoting *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (CA2 1990))), that children's rights will not be "fully protected" without trained legal assistance, *Osei-Afriye*, 937 F.2d at 883 (quoting *Cheung*, 906 F.2d at 61), and that permitting "guardians to bring *pro se* litigation * * * invites abuse," *Cheung* at 61.

As the SSI cases explain, none of those concerns are present, when:

(1) the cases do not affect multiple parties with different or conflicting interests but rather parents and children whose interests are identical (*Machadio*, 276 F.3d at 106);

(2) parents have a stake in the issue because of their financial responsibility for the child and the financial effect on them of a denial of benefits (*ibid.*; *Harris*, 209 F.3d at 416-17);

(3) parents are permitted to and often do represent their children in the administrative process that must be exhausted before seeking judicial review (*Machadio*, 276 F.3d at 107);

(4) the cases involve administrative record review and little new fact-finding (*Harris*, 209 F.3d at 416);

(5) parents are often unable to find counsel (*ibid.* (citing *Maldonado*, 55 F. Supp. 2d at 305));

(6) a ban on parental representation would jeopardize the child's statutory right to judicial review of adverse decisions (*id.* at 417); and

(7) the benefits sought are intended to aid children during their childhood and, therefore, must be timely provided (*id.* at 416 (citing *Maldonado*, 55 F. Supp. 2d at 305)).

IDEA cases satisfy each of these criteria.

(1) & (2) The tort cases relied on to preclude parents from "representing" their children under IDEA involved rights of the child at the very least separate and distinct from that of the parent, *Johns*, 114 F.3d at 877 (non-lawyer father could not litigate *pro se* minor son's claim that police unlawfully stopped, towed, and stored son's car); *Osei-Afriye*, 937 F.2d at 883 (non-lawyer father could not litigate *pro se* tort claims relating to the treatment of minor daughters for malaria); *Cheung*, 906 F.2d at 61 (non-lawyer father could not litigate *pro se* case challenging municipal youth orchestra's decision where to seat his minor daughter in first violin section), and sometimes in conflict with the parent's interests, see *Meeker v. Kercher*, 782 F.2d 153, 154 (CA10 1986) (non-lawyer father could not litigate *pro se* minor daughters' claim alleging that child abuse investigation resulting in the transfer of custody of daughters to state violated family rights guaranteed by the Fourteenth Amendment). Unlike those cases, parents suing under IDEA have congruent and not conflicting interests in their child's receipt of the statutory guarantee of a FAPE. In addition to the desire to see their children grow up to live productive and independent adult lives, parents of disabled children have a significant financial responsibility for the child. Indeed, Congress "recogni[zed] that to educate a special needs child, it was going to cost effectively double what it costs to normally educate a child in this country." 150 Cong. Rec. S5331 (May 12, 2004) (statement of Sen. Kennedy).

(3) Parents are statutorily permitted and often do represent their children and themselves at IDEA administrative-level hearings where they may subpoena evidence, submit evidence, and make statements about law and facts. 20 U.S.C. 1415(h)(2).

(4) Although 20 U.S.C. 1415(i)(2)(C) allows a federal judge to hear additional evidence at the request of a party, parties are not ordinarily permitted to supplement the record or to have witnesses testify in IDEA review proceedings

unless they can show prejudice or that the evidence was unavailable at the time of the state hearing. See, *e.g.*, *West Platte R-II Sch. Dist. v. Wilson*, 439 F.3d 782, 785 (CA8 2006); *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659 (CA4 1998); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773 (CA1 1984). Moreover, *Rowley* held that courts must give "due weight" to the findings of the state administrative proceeding and should not "substitute their own notions of sound educational policy for those of the school authorities they review." 458 U.S. at 206. IDEA cases are, therefore, unlike original tort actions or other types of administrative actions, such as Title VII or Prison Litigation Reform Act actions, in which courts conduct *de novo* review.

Relatedly, the tort cases' concern about abuse of the judicial process is largely inapplicable to IDEA cases. As amended in 2004, IDEA expressly allows States and local school districts to recover attorneys' fees from a parent "if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. 1415(i)(3)(B)(i)(III). This provision may serve as a check on meritless *pro se* lawsuits or possibly defray some of the costs. If this provision proves to be an inadequate deterrent to frivolous IDEA lawsuits, Congress can further amend the statute to address the problem.

(5) Parents of disabled children are overwhelmingly unable to locate counsel to litigate IDEA disputes. As the American Bar Association has acknowledged, "[i]n many communities there appear to be few, if any, lawyers experienced or willing to handle" IDEA cases. Am. Bar Ass'n, Comm'n on Nonlawyer Practice, *Nonlawyer Activity in Law Related Situations: A Report with Recommendations* 81 (1995); see also *Collinsgru*, 161 F.3d at 236 ("[M]ost attorneys will be reluctant to take on [IDEA] cases * * * characterized as they are by voluminous administrative records, long administrative hearings, and specialized legal

issues, without a significant retainer."). The surveys conducted by *amici* bear this out. See Br. of Autism Soc'y of Am. *et al.* in Support of Petitioners 9-10; Br. of Council of Parent Attorneys & Advocates *et al.* in Support of Petitioners 9-10 n.4.

(6) & (7) Where a child is the real party in interest, a tort case can easily can be dismissed without prejudice to being refiled when the child reaches the age of 18 or stayed until that time. *Johns*, 114 F.3d at 878; *Osei-Afriye*, 937 F.2d at 883; *Cheung*, 906 F.2d at 62. This is not a realistic possibility under IDEA because, although a parent may transfer rights under IDEA to the child at the child's majority, those rights lose substantially all of their value if not pursued promptly, since it is not money but a change in educational placement that is being pursued. See *Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting). In the process, Congress' primary goal of preparing children with disabilities for "further education, employment, and independent living" will be thwarted. 20 U.S.C. 1400(d)(1)(A); see also 20 U.S.C. 1450(1) (acknowledging the "ongoing obligation" of the federal government to enable children with disabilities "to lead productive and independent adult lives."), 1470(1) (ensuring "parents receive training and information designed to assist the children * * * in preparing to lead productive independent adult lives."), 1471(b)(1)(B), 1472(a)(1)(B). IDEA is intended to provide a means for intervention that addresses the child's disabilities as quickly as possible because the longer appropriate services are delayed, the more difficult it becomes to counter the disabilities. See *Burlington*, 736 F.2d at 798 ("[S]pecial need children [may not be] treated as though they were non-perishable commodities able to be warehoused until the termination of *in rem* proceedings."). Accordingly, the tort cases' desire to give children "a true choice" between proceeding with or without counsel is unrealistic.

Moreover, the rationale for allowing parents to represent their children is even *stronger* in IDEA cases than in SSI cases in one important respect. This is because judicial review of an SSI decision is available only to a losing claimant – not the agency. See 42 U.S.C. 405(g). There is no danger, therefore, that a successful SSI claimant will lose the benefits she won at the administrative level because her parents are unable to hire an attorney. If the court of appeals' decision is upheld in this case, however, that is precisely what could happen to any child who succeeds on an IDEA claim at the administrative level. If the child's parents cannot afford or locate an attorney, the losing school district need only file suit and move for default or summary judgment to overturn the administrative decision, which would yield an absurd result that Congress could not have intended. See *Nixon*, 541 U.S. at 144 (court's task is to interpret statutes "in light of the purposes Congress sought to serve while avoiding "absurd results").

III. CONGRESS' REFUSAL IN 2004 TO ENACT A PROVISION ALLOWING PARENTAL *PRO SE* REPRESENTATION IS IRRELEVANT

In support of the court of appeals' decisions, respondent relied heavily in its BIO on congressional inaction – namely, the fact that Congress did not adopt a proposed amendment that would have expressly authorized parents to proceed *pro se* on behalf of their children in IDEA lawsuits. BIO 5-6, 14-15. In May 2004, the Senate passed a bill that would have amended 20 U.S.C. 1415(i) to provide that "a parent of a child with a disability may represent the child in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004). The Conference Committee – without explanation – omitted this provision from the final version of

the IDEA amendments that Congress enacted in 2004. See H.R. Conf. Rep. No. 779, at 220 (2004).

This failed amendment "lacks persuasive significance." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). As this Court has emphasized repeatedly, "[f]ailed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Ibid.* (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)); accord, *Lockhart v. United States*, 126 S. Ct. 699, 702 (2005) (quoting *United States v. Craft*, 535 U.S. 274, 287 (2002)); see also, *e.g., Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("'[M]ute intermediate legislative maneuvers' are not reliable indicators of congressional intent." (quoting *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947)); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws."); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) ("Congress' silence is just that – silence"). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Central Bank of Denver*, 511 U.S. at 187 (quoting *LTV Corp.*, 496 U.S. at 650). At any rate, even if the failed Senate amendment were relevant to whether parents may proceed *pro se* on behalf of their children, it does not undermine the conclusion that parents may represent *themselves* in federal court on the substantive statutory claim to a FAPE that they share jointly with their child and their own procedural claims. Accordingly, there was no need, as respondent mistakenly asserts, for Congress to enact a further statutory provision that "could have expressly allowed non-lawyer parents to proceed *pro se*." BIO 13. Indeed, one plausible inference is that Congress ultimately concluded that the Senate amendment was unnecessary because other provisions of IDEA confirm that parents are real parties in

interest entitled to pursue both types of claims in court, and 28 U.S.C. 1654 already provides that such parties may proceed *pro se*.[29]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JEAN-CLAUDE ANDRÉ
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 CARDIFF AVE.
LOS ANGELES, CA 90034
(310) 558-0932

DECEMBER 2006

---

[29] This explanation is largely consistent with the understanding of the Senate committee that proposed the amendment. As the Committee on Health, Education, Labor, and Pensions explained, in its view, "current statutory language and * * * the rich legislative history emphasizing the importance of pa[illegible]tal involvement," already established "that parents have a right to represent their child in court, without a lawyer for purposes of IDEA law, regardless of whether their claims involve procedural or substantive issues." S. Rep. No. 108-185, at 41-42 (2003). Accordingly, the Committee proposed the amendment simply to "clarify" and "make clear" that a parent of a child with a disability may represent the child in any action * * * in State or Federal Court, without the assistance of an attorney." *Id.* at 42.

APPENDIX

The Individuals with Disabilities in Education Act, 20 U.S.C. 1400 *et seq.*, provides in pertinent part:

§ 1400. Congressional statements and declarations

* * * * *

(c) Findings

Congress finds the following:

* * * * *

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because—

* * * * *

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

* * * * *

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

* * * * *

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

* * * * *

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

* * * * *

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

* * * * *

§ 1401. Definitions

* * * * *

(9) Free appropriate public education

The term "free appropriate public education" means special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

* * * * *

(10) Highly qualified

* * * * *

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this section or subchapter shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular State educational agency or local educational agency employee to be highly qualified.

* * * * *

(26) Related services

(A) In general

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological

services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

* * * * *

(29) Special education

The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

* * * * *

§ 1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

* * * * *

(4) Individualized education program

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

* * * * *

(10) Children in private schools

* * * * *

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the

means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

* * * * *

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

* * * * *

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

* * * * *

(14) Personnel qualifications

* * * * *

(E) Rule of construction

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.

* * * * *

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

* * * * *

(d) Individualized education programs

(1) Definitions

In this chapter:

* * * * *

(B) Individualized education program team

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who—

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP Team attendance

(i) Attendance not necessary

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related

services is not being modified or discussed in the meeting.

(ii) Excusal

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(iii) Written agreement and consent required

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

* * * * *

(3) Development of IEP

(A) In general

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—

(i) the strengths of the child;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

* * * * *

(D) Agreement

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.

* * * * *

(4) Review and revision of IEP

(A) In general

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

* * * * *

(ii) revises the IEP as appropriate to address—

* * * * *

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B) of this section;

* * * * *

§ 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of Title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1) of this section, whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to the child.

* * * * *

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) of this section shall apply to the timeline described in this subparagraph.

* * * * *

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a

complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

* * * * *

(c) Notification requirements

* * * * *

(2) Due process complaint notice

* * * * *

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

* * * * *

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6) of this section; and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including—

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation

* * * * *

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

* * * * *

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this section, or to deny any other rights afforded under this subchapter; and

* * * * *

(F) Written agreement

In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

* * * * *

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

* * * * *

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i),

the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

* * * * *

(3) Limitations on hearing

* * * * *

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

* * * * *

(g) Appeal

(1) In general

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

* * * * *

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

* * * * *

(i) Administrative procedures

* * * * *

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

* * * * *

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

* * * * *

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure

or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

* * * * *

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

* * * * *

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A) of this section, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

* * * * *

(k) Placement in alternative educational setting

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

* * * * *

(l) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

* * * * *

(B) all other rights accorded to parents under this subchapter transfer to the child;

FILED
JAN 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, *et al.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT

PIERRE H. BERGERON
SQUIRE, SANDERS & DEMPSEY, LLP
312 Walnut Street
Suite 3500
Cincinnati, Ohio 45202
(513) 361-1200

CHRISTINA HENAGEN PEER
(Counsel of Record)
SQUIRE, SANDERS & DEMPSEY, LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8500

January 23, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

To what extent, if any, may a non-lawyer parent of a minor child with a disability proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*

TABLE OF CONTENTS

Page

Statutory and Constitutional Provisions 1

Statement 1

Summary of Argument 6

Argument 8

I. Non-Attorney Parents Cannot Represent Their Child *Pro Se* in Court Under IDEA 8

A. The Common Law Prohibits Lay Parents From Representing Their Child in Court 9

B. Congress Did Not Abrogate the Common Law Rule 13

C. Congress Recently Considered and Rejected Inclusion of Clear Language in IDEA Permitting Parents to Represent Their Child *Pro Se* 15

D. Children's Rights Are Protected Both by Congress and the Federal Rules 17

II. Congress Provided Substantive Rights to Children with Disabilities and Did Not Grant Their Parents Judicially Enforceable Rights 19

A. The Purpose of the IDEA is to Provide Children with Disabilities a Free Appropriate Public Education 20

B. Parental Safeguards Under IDEA are Collateral, Not Independent Substantive Rights 25

C. Congress Described Parental Safeguards as "Procedural" 32

D. Parents Do Not Have Independent Redressable Rights Under IDEA to To Pursue *Pro Se* 36

III. Petitioners' Proposed Rules Would Violate the "Clear Notice" Requirement of the Spending Clause 40

A. Congress Must Provide "Clear Notice" to the States Before Subjecting Them to Conditions, Obligations, or Liabilities 41

B. Petitioners' Proposed Rule Would Inflict Conditions, Obligations, and Liabilities for Which States Did Not Receive Clear Notice 44

Conclusion 50

TABLE OF AUTHORITIES

Cases:

Alexander v. Sandoval,
532 U.S. 275 (2001) 43

Arlington Central Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455 (2006) ..... *passim*

Astoria Federal Sav. & Loan Assoc. v. Solimino,
501 U.S. 104 (1991) 9

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003) 14

Board of Educ. of Committee Consolidated Sch. Dist. v. Illinois State Board of Education,
938 F.2d 712 (7th Cir. 1991) 20

Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982) 20, 34, 40

Bob Jones University v. United States,
461 U.S. 574 (1983) 16

Bowen v. Massachusetts,
487 U.S. 879 (1988) 9

Cavanaugh v. Cardinal Local Sch. Dist.,
409 F.3d 753 (6th Cir. 2005) ..... *passim*

Cedar Rapids Community Sch. Dist. v. Garret F., 526 U.S. 66 (1999) 40

Cheung v. Youth Orchestra Foundation of Buffalo, Inc., 906 F.2d 59 (2d Cir. 1990) 10, 11, 18

Collinsgru v. Palmyra Bd. of Education,
161 F.3d 225 (3d Cir. 1998) 9, 12, 29, 34, 43, 49

Dellmuth v. Muth,
491 U.S. 223 (1989) 17

Devine v. Indian River County Sch. Bd.,
121 F.3d 576 (11th Cir. 1997) 10, 18, 49

Diamond v. Michigan,
431 F.3d 262 (6th Cir. 2005) 36

Doe v. Board of Educ. of Baltimore Cty.,
165 F.3d 260 (4th Cir. 1998) ..... *passim*

Emery v. Roanoke City Sch. Board,
432 F.3d 294 (4th Cir. 2005) 28

FEC v. Akins,
524 U.S. 11 (1998) 38

Ford v. Long Beach Unified Sch. Dist.,
461 F.3d 1087 (9th Cir. 2006) 12

Gonzaga University v. Doe,
536 U.S. 273 (2002) 33, 43

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 9

Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552 (6th Cir. 2000) 10

Green v. Bock Laundry Machine Co.,
490 U.S. 235 (1989) 13

Honig v. Doe,
484 U.S. 305 (1988) 33

Johns v. County of San Diego,
114 F.3d 874 (9th Cir. 1997) 10, 18

Jones v. Niagara Frontier Transport Authority,
722 F.2d 20 (2d Cir. 1983) 45

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 38

M.A. v. State-Operated Sch. Dist. of the City of Newark, 344 F.3d 335 (3d Cir. 2003) 47

Machadio v. Apfel,
276 F.3d 103 (2d Cir. 2002) 15

Maldonado v. Apfel,
55 F. Supp. 2d 296 (S.D.N.Y. 1999) 14

Maroni v. Pemi-Baker Reg'l School,
346 F.3d 247 (1st Cir. 2003) 27, 44, 49

McNeil v. United States,
508 U.S. 106 (1993) 10

Meeker v. Kercher,
782 F.2d 153 (10th Cir. 1986) 10, 18

Mosely v. Board of Educ. of the City of Chicago, 434
F.3d 527 (7th Cir. 2006) 33, 49

Myers v. Loudon County Public Schools,
418 F.3d 395 (4th Cir. 2005) 10

O'Diah v. Volkswagen of Am., Inc., 91 Fed. Appx.
159 (1st Cir. 2004) 10

Ortega v. Bibb County School District,
397 F.3d 1321 (11th Cir. 2005) 37

Osei-Afriyie v. Medical College of Pennsylvania,
937 F.2d 876 (3d Cir. 1991) 10, 11, 18

Palmer v. Massachusetts,
308 U.S. 79 (1939) 20, 32, 36

Pennhurst State Sch. & Hospital v. Halderman,
451 U.S. 1 (1981) 17, 42, 49

Pension Benefit Guaranty Corp. v. LTV Corp.,
496 U.S. 633 (1990) 16

Powell v. Alabama,
287 U.S. 45 (1932) 11

Rapanos v. United States,
126 S. Ct. 2208 (2006) 16

Russello v. United States,
464 U.S. 23 (1983) 14

S.N. v. Pittsford Central Sch. Dist.,
448 F.3d 601 (2d Cir. 2006) 12

Schaffer v. Weast,
126 S. Ct. 528 (2005) ..... *passim*

School Committee of the Town of Burlington, Mass. v. Department of Educ. of Mass.,
471 U.S. 359 (1985) 31

Shepherd v. Wellman,
313 F.3d 963 (6th Cir. 2002) 10

Smith v. Smith, 49 Fed. Appx. 618 (7th Cir. 2002) 10

United States v. Texas,
507 U.S. 529 (1993) 13

United States v. Vonn,
535 U.S. 55 (2002) 14

Virginia v. Riley,
106 F.3d 559 (4th Cir. 1997) 47

Wenger v. Canastota Central Sch. Dist.,
146 F.3d 123 (2d Cir. 1998) 18, 49

White v. Ascension Parish Sch. Bd.,
343 F.3d 373 (5th Cir. 2003) 34

Winkelman v. Parma City Sch. Dist., 166 Fed. Appx. 807 (6th Cir. 2006) 5, 11

Woodside v. School District of Philadelphia Board of Education, 248 F.3d 129 (3d Cir. 2001) 12

Constitutional Provisions:

U.S. Const. amend. X 47
U.S. Const. amend. XI 47
U.S. Const., Art. I, § 8, cl. 1 ..... 1, 40

Statutes & Regulations:

Individuals with Disabilities Education Act,
20 U.S.C. § 1400 *et seq.*
20 U.S.C. § 1400(c)(1) 20
20 U.S.C. § 1400(c)(3) 35
20 U.S.C. § 1400(d)(1)(A) 7, 21
20 U.S.C. § 1401(10)(E) 29
20 U.S.C. § 1401(23) 26
20 U.S.C. § 1406(b)(2) 22, 33
20 U.S.C. § 1407(b) 22
20 U.S.C. § 1408(a)(2)(C)(i) 21
20 U.S.C. § 1411 26
20 U.S.C. § 1411(a)(1) 23
20 U.S.C. § 1411(e)(3)(E) 7, 9, 25, 28, 30, 31
20 U.S.C. § 1411(e)(3)(F)(i) 21
20 U.S.C. § 1412(a)(1)(A) 7, 8, 21, 27, 35
20 U.S.C. § 1412(a)(1)(B) 21
20 U.S.C. § 1412(a)(3) 22
20 U.S.C. § 1412(a)(5)(A) 2
20 U.S.C. § 1412(a)(5)(B)(i) 21
20 U.S.C. § 1412(a)(6)(A) 33
20 U.S.C. § 1412(a)(10) 30

20 U.S.C. § 1412(a)(10)(C)(ii) 21, 30
20 U.S.C. § 1412(a)(11)(B) 21
20 U.S.C. § 1412(a)(12)(A)(i) 21
20 U.S.C. § 1412(a)(14)(E) 29
20 U.S.C. § 1414(a) 22
20 U.S.C. § 1414(a)(1)(D)(i)(II) 21
20 U.S.C. § 1414(b) 22
20 U.S.C. § 1414(d) 22
20 U.S.C. § 1414(d)(1)(A)(i)(II) 22, 47
20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa) 2, 7
20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(cc) 28
20 U.S.C. § 1414(d)(1)(B) 22, 34
20 U.S.C. § 1414(d)(3)(A)(iv) 47
20 U.S.C. § 1415 38
20 U.S.C. § 1415(a) 33
20 U.S.C. § 1415(b) 33
20 U.S.C. § 1415(b)(6) 21
20 U.S.C. § 1415(b)(6)(A) ..... *passim*
20 U.S.C. § 1415(b)(7)(A)(ii)(III) 23
20 U.S.C. § 1415(b)(8) 28
20 U.S.C. § 1415(c)(2)(B) 28
20 U.S.C. § 1415(d)(1)(a) 33
20 U.S.C. § 1415(d)(2) 28
20 U.S.C. § 1415(e) 23
20 U.S.C. § 1415(e)(1) 23
20 U.S.C. § 1415(f)(1)(A) 23
20 U.S.C. § 1415(f)(1)(B)(iii) 30

20 U.S.C. § 1415(f)(3)(E) 30, 38
20 U.S.C. § 1415(f)(3)(E)(i) 23, 33, 36
20 U.S.C. § 1415(f)(3)(E)(ii) 24, 36
20 U.S.C. § 1415(f)(3)(E)(iii) 36
20 U.S.C. § 1415(g)(1) 37
20 U.S.C. § 1415(h) 13
20 U.S.C. § 1415(h)(2) 44
20 U.S.C. § 1415(i) 13
20 U.S.C. § 1415(i)(2) 17
20 U.S.C. § 1415(i)(2)(A) 7, 23, 37
20 U.S.C. § 1415(i)(3)(B) 17
20 U.S.C. § 1415(i)(3)(B)(i)(I) 29
20 U.S.C. § 1415(i)(3)(D) 29
20 U.S.C. § 1415(i)(3)(F) 29
20 U.S.C. § 1415(k) 23
20 U.S.C. § 1415(m) 7, 26, 27, 28, 30
20 U.S.C. § 1415(m)(1)(B) 26
20 U.S.C. § 1415(m)(1)(C) 27
20 U.S.C. § 1415(o) 28
20 U.S.C. § 1416(a)(2)(A) 22
20 U.S.C. § 1419 26
20 U.S.C. § 1431 1
20 U.S.C. § 1471 17
28 U.S.C. § 1654 ..... 10, 18, 39, 42, 43
Individuals with Disabilities Improvement Act of 2004 Public L. No. 108-446, 118 Stat. 2647 1
20 C.F.R. § 416.1505 15

34 C.F.R. § 300.111(a)(i) 21
34 C.F.R. § 300.321(b)(2) 47
34 C.F.R. § 300.115(a) 2
34 C.F.R. § 300.301 22
34 C.F.R. § 300.306 22
34 C.F.R. § 300.306(c)(2) 22
34 C.F.R. § 300.320 22
34 C.F.R. § 300.321(b)(2) 47
34 C.F.R. § 300.323 34
34 C.F.R. § 300.507(b) 17
34 C.F.R. § 300.517(b)(1) 47
34 C.F.R. § 300.519 26
Fed. R. Civ. P. 11 ..... 45, 46
Fed. R. Civ. P. 17 ..... 18, 19, 26, 28
Fed. R. Civ. P. 55 19
Fed. R. Civ. P. 60 46
Ohio Admin. Code 3301-51-05(J) 28

Miscellaneous:

Black's Law Dictionary (8th ed. 2004) 37
Norman J. Singer, *Sutherland Statutes & Statutory Construction*, § 20.3 (6th ed. 2002) 35
150 Cong. Rec. S5430 (daily ed. May 13, 2004) 15, 48
H.R. Conf. Rep. No. 99-687 42
S. Rep. No. 108-185 108th Cong., 1st Sess. (2003) 10, 15, 16

STATUTORY AND CONSTITUTIONAL PROVISIONS

1. Petitioners' appendix to their brief omits several of the salient provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*,[1] and therefore Respondent adds additional provisions in an appendix to this brief.

2. Article I, section 8, clause 1 of the U.S. Constitution, which includes the Spending Clause, provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST., Art. I, § 8, cl. 1.

STATEMENT

Respondent is the second-largest school district in the Greater Cleveland area. It serves almost 13,000 students, nearly 2,200 of whom receive some form of special education services. Because Respondent provides such a wide range of special education services, it employs a full-time director of special education and three special education supervisors who oversee these programs. Respondent also provides services to disabled toddlers and infants under Subchapter III of IDEA (20 U.S.C. § 1431, *et seq.*) in order to better enable such children to prepare for elementary education.

Respondent develops, in collaboration with parents, individualized education programs (IEP) for each child who receives special education and related services under the IDEA. The IEP sets forth the child's present levels of performance, educational needs, and measurable goals, objectives and services that are designed to "meet the child's needs . . . to

---

[1] The Individuals with Disabilities Education Act was recently reauthorized as the Individuals with Disabilities Education Improvement Act of 2004, Public L. No. 108-446, 118 Stat. 2647, and the current statute will be referenced as "IDEA" throughout this Brief. Respondent acknowledges that the current version of the statute applies to the question presented here.

enable the child to be involved in and make progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa). These services are provided "[t]o the maximum extent . . . with children who are not disabled" in accordance with IDEA's mandate of placement in the least restrictive environment. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.115(a) (describing the continuum of alternative placements).

Jacob Winkelman is a nine year-old autistic child who has received or been offered special education and related services under the auspices of IEPs created by Respondent, in collaboration with Jacob's parents, since he was three years-old. JA at 31. During the 2000-01 school year, Jacob attended Respondent's First Step Preschool. When it became apparent that Jacob was not progressing satisfactorily at First Step, Respondent placed him at the Achievement Centers for Children preschool, a separate facility that specializes in educating students with autism and teaching skills students need to return to a less restrictive school setting with non-disabled peers. JA at 32. Jacob attended Achievement Centers for the 2001-02 and 2002-03 school years and enjoyed success in the program. JA at 32-34, 71.

In preparation for Jacob's transition to kindergarten, teachers from Respondent's Pleasant Valley Elementary School visited Achievement Centers' program, observed Jacob, and met with his teachers. The elementary school teachers learned that Jacob's greatest area of need was developing social skills and learning to interact appropriately with his peers. JA at 34, 54-56. Based on this information, along with more formal assessments, Respondent developed a draft IEP for Jacob. The draft IEP, which was discussed with the IEP team, outlined Jacob's present levels of performance and set forth goals, objectives and services designed to provide him with an educational benefit. JA at 36-37.

The IEP team, with the exception of Mr. and Mrs. Winkelman, agreed that Jacob's least restrictive environment was a special education resource room at Pleasant Valley staffed by a teacher and two educational assistants who taught six to eight children. JA at 37-38, 58-59. Jacob would receive one-on-one and small group instruction using the same methodologies that had proven successful at Achievement Centers. The IEP included speech and language therapy and an occupational therapy evaluation. Additionally, the proposed placement included opportunities for Jacob to socialize with both disabled and non-disabled peers. JA at 58-61.

Mr. and Mrs. Winkelman disputed the placement and requested that Jacob be placed at Monarch School, a private school that serves only children with autism. Monarch offered limited opportunities for socialization and no opportunities for interaction with non-disabled peers, as students typically work one-on-one in office sized rooms with a staff member. JA at 41. Respondent's IEP team members considered Monarch too restrictive because it would not afford Jacob the peer interaction necessary to meet his needs and further his development. JA at 63.

Based on the placement dispute, Mr. and Mrs. Winkelman submitted a due process complaint, which framed a single issue: whether Respondent's proposed program offered Jacob a free appropriate public education (FAPE) in his least restrictive environment. Resp. Br. at 1a. Petitioners' complaint did not allege that Mr. and Mrs. Winkelman had been denied a FAPE or any procedural violations. Petitioners requested that Jacob attend Monarch at Respondent's expense during the pendency of their due process proceedings. Upon the denial of this request, Petitioners nevertheless sent Jacob to Monarch at their expense for the 2003-04 school year.

A four day due process hearing, during which Petitioners were represented by counsel, followed in the wake of the due

process complaint. JA at 22. After reviewing the evidence, the hearing officer concluded that Respondent's proposed placement at Pleasant Valley offered Jacob a FAPE. JA at 78. Her decision compared the Achievement Centers' program, where Jacob experienced success, with the Pleasant Valley program, and concluded that the programs were "strikingly similar." JA at 106, 134. Given the similarities and other factors, the evidence demonstrated a great likelihood that Jacob would flourish at Pleasant Valley. JA at 90-93, 97.

The hearing officer found persuasive the testimony from numerous witnesses that Jacob needed to learn social skills and that Pleasant Valley would enable him to "be exposed to both disabled and nondisabled peers and would be afforded the opportunity to generalize his social and language skills across diverse environments." JA at 97. She also emphasized that "most importantly," Jacob's participation in the Pleasant Valley classroom would move him "one step closer to the ultimate goal of participation with regular education peers in school and other activities to the maximum extent appropriate." *Id.*

Dissatisfied with the decision, Petitioners, through counsel, filed an appeal with a state level review officer, who affirmed the impartial hearing officer's decision in its entirety. JA at 158. In comparing the programs, the state level review officer explained that Monarch was the "most restrictive environment employing almost all one-to-one instruction and very little group or peer interactions" while the Pleasant Valley classroom was "the most inclusive environment, employing both one-to-one and small group interaction along with the most opportunities for peer and other social interactions." JA at 134-35. In light of IDEA's least restrictive environment mandate, the state level review officer recognized: "Arguably, then, the arrangement at Monarch could even be characterized as regressive to Jacob's needs for improved and increased social interaction." JA at 135. "In fact, using a *de novo* standard, it

would be difficult to argue that the Monarch School is truly the 'best' or even appropriate placement for Jacob considering the overwhelming agreement among the witnesses for both parties that Jacob is both academically ready for kindergarten and socially ready for interactions with higher functioning peers." JA at 157.

Petitioners filed a *pro se* complaint before the U.S. District Court for the Northern District of Ohio, and initially sought an injunction to place Jacob at Monarch, at Respondent's expense, during the pendency of the proceedings. The district court denied the request for injunctive relief, finding that Jacob's stay-put placement was Pleasant Valley. Petitioners, *pro se*, took an interlocutory appeal to the Sixth Circuit, again requesting that Jacob be placed at Monarch. Prior to obtaining counsel, Petitioners filed "emergency" motions to stay the district court's decision despite neglecting to request a stay from the district court. The Sixth Circuit denied the "emergency" relief as procedurally improper and affirmed the district court's denial of injunctive relief.

Meanwhile, the district court proceeded to the merits of Petitioners' case – whether Respondent's IEP offered Jacob a FAPE – and Petitioners retained counsel to represent them before the district court. Utilizing a modified *de novo* standard, the court affirmed the decisions of the administrative officers in their entirety. Like the administrative officers, the district court emphasized the "overwhelming consensus that Jacob needs more peer interaction" in concluding that Respondent offered Jacob a FAPE. Pet. App. 21a. In the injunction appeal, the Sixth Circuit recognized that Petitioners "cannot tenably claim at this point that they have a likelihood of success on the merits (in view of the three merits decisions against them)." *Winkelman v. Parma City Sch. Dist.*, 166 Fed. Appx. 807, 811 (6th Cir. 2006).

Petitioners appealed the merits decision *pro se* to the Sixth Circuit. Based on a recent decision, the Sixth Circuit held that Mr. and Mrs. Winkelman could not represent Jacob *pro se*, nor could they pursue any individual IDEA claims. The Sixth Circuit ordered the Winkelmans to obtain counsel or face dismissal of the appeal. Pet. App. 1a-2a. Opting for a different course, Petitioners retained counsel to seek a stay from this Court and a writ of certiorari, both of which were granted.

As these proceedings have continued, during the 2004-05 school year, the Winkelmans elected not to send Jacob to school at all, notwithstanding decisions from two administrative levels concluding that he would succeed at Pleasant Valley. During the 2005-06 school year, Jacob again attended Monarch at Petitioners' expense. The current academic year finds Jacob again out of school, with his parents pursuing a host of other due process claims (separate from the claims forming the basis of this action). The Winkelmans are represented by counsel in these latest proceedings, two of which are presently on-going. In the midst of all of this litigation and acrimony, it is easy to forget that this case is really about Jacob – not his parents.

SUMMARY OF ARGUMENT

Petitioners offer this Court two paths to permit non-attorney parents to proceed *pro se* under the Individuals with Disabilities Education Act (IDEA), neither of which demonstrates fidelity to the statute. Jeff and Sandee Winkelman either want the right to represent their son, Jacob, *pro se* in federal court, or failing that, demand the ability to "represent" Jacob by seizing their own substantive rights under IDEA.

The plain language of IDEA does nothing to abrogate the common law ban on non-attorney parents representing their child in court. To the contrary, although IDEA permits parties in administrative hearings to proceed without counsel, Congress declined to grant such rights in the sections governing civil actions. This omission was hardly accidental, as Congress

recently considered and rejected an amendment to IDEA that would have permitted non-attorney parents to represent their child *pro se* in IDEA civil actions – the very right Petitioners ask this Court to create. Because this amendment concerns the precise issue before the Court and was rejected amidst widespread judicial renunciation of Petitioners' position, it confirms that Congress did not abrogate the common law rule.

Nor can congressional rejection of parental *pro se* representation be thwarted by casting an even broader net to secure independent parental substantive rights. Any such effort flies in the face of the statute's plain language, which creates a substantive right to a "free appropriate public education" to disabled children "between the ages of 3 and 21," and emphasizes "meet[ing] the child's needs" as the foundation of the statute. 20 U.S.C. § 1412(a)(1)(A), 1414(d)(1)(A)(i)(II)(aa), 1400(d)(1)(A). Every aspect of the statute, from the scope of permissible regulations to the individualized education program to dispute resolution, revolves around the interests of the child. By contrast, Congress limited parental rights to a narrow set of "procedural" safeguards. In fact, Congress envisioned that legal actions would be brought "on behalf of a child with a disability," *id.* at § 1411(e)(3)(E), during the child's minority and permitted States to transfer "all" parental procedural rights to a child who attained the age of majority. *Id.* at § 1415(m).

Petitioners brush by these details, preferring instead to place primary reliance on the "party aggrieved" phrase that describes who may bring a civil action. *Id.* at § 1415(i)(2)(A). Yet this ignores the threshold issue of whether parents have independent redressable rights. Congress situated the child as the only real party in interest in IDEA litigation. The procedural safeguards allowed to parents represent nothing more than a practical response to the consequence of the child's incapacity. Such utilitarian measures should not be mistaken as a conferral of substantive rights. Because parents lack their own enforceable

rights, the Court need not wrestle with the "party aggrieved" question, which contemplates, as Petitioners seem to agree, individuals who have actually suffered a violation of their own rights.

Petitioners' march down both paths not only collides with the plain language of the statute, but also transgresses the "clear notice" requirement for Spending Clause legislation. As this Court recently held, legislation passed pursuant to the Spending Clause requires Congress to spell out all conditions, obligations, and liabilities imposed upon the States in clear and unequivocal language. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455 (2006). Petitioners seek to saddle the States with two new conditions untethered to the statutory text: either granting parents the full complement of substantive rights under the statute or allowing them to represent their child *pro se* in court. Such requirements fundamentally alter the statutory design by elevating parental rights and interests above those of their child. And they yield tangible consequences for school districts grappling with an unfunded mandate. The States never signed up for such a bargain. Indeed, the fact that six federal circuits rejected one or both of the proposed rules offered by Petitioners illustrates that Congress did not provide "clear notice" of these conditions to the States consistent with this Court's mandate in *Arlington*.

ARGUMENT

I. Non-Attorney Parents Cannot Represent Their Child *Pro Se* In Court Under IDEA

IDEA ensures that a "free appropriate public education" is available to all "children with disabilities." 20 U.S.C. § 1412(a)(1)(A). When disputes arise regarding whether a FAPE has been provided, Congress confined the scope of dispute resolution to addressing "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* at §

1415(b)(6)(A). For that reason, Congress understood that any litigation would be "brought on behalf of a child with a disability to ensure a free appropriate public education for such child." *Id.* at § 1411(e)(3)(E).

Permitting actions to be brought on a child's behalf does not translate into allowing parents to represent their child *pro se* in federal court. No court has ever held that Congress abrogated the common law in IDEA in order to permit lay parents to represent their child *pro se*. Nor is such a right found in the statute's plain language. Far from overriding the common law, Congress specifically recognized the common law rule and precedent rejecting parents' attempts to represent their child *pro se* before discarding legislation that would have altered those results.

A. The Common Law Prohibits Lay Parents from Representing Their Child in Court

1. The rule that a non-attorney parent "may not represent another person in court is a venerable common law rule." *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998) (citations omitted). It is a "well-settled presumption" that "Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). In fact, "courts may take it as a given that Congress has legislated with an expectation that the [common-law] principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

This Court need not indulge in presumptions because Congress acknowledged the common law rule in a committee report when it reauthorized IDEA in 2004 shortly before rejecting an amendment that would have accomplished what Petitioners ask this Court to do: "Both Federal and State laws generally prevent a non-attorney parent from representing his or

her child in a court proceeding, as these laws provide that a person can only represent himself or herself, and not proceed on behalf of their minor child." S. Rep. No. 108-185 108th Cong., 1st Sess., at 41. Indeed, all circuits to address the question subscribe to this rule. *See e.g., O'Diah v. Volkswagen of Am., Inc.*, 91 Fed. Appx. 159, 160 (1st Cir. 2004); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Osei-Afriyie v. Med. Coll. of Pennsylvania*, 937 F.2d 876, 882 (3d Cir. 1991); *Myers v. Loudon County Pub. Schs*, 418 F.3d 395, 401 (4th Cir. 2005); *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002); *Smith v. Smith*, 49 Fed. Appx. 618, 620 (7th Cir. 2002); *Johns v. County of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1997); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 578, 582 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998).

The common law ban on lay parent representation comports with 28 U.S.C. § 1654, which provides that "the parties may plead and conduct *their own cases* personally or by counsel. . . ." (Emphasis added). The circuits have recognized that Section 1654 only addresses the right to represent oneself, and thus "does not speak to the issue" of whether parents can represent their child. *Devine*, 121 F.3d at 581; *Cheung*, 906 F.2d at 61.

2. The common law rule furthers several important policy objectives. *Pro se* representation carries with it risks that are not present when a party is represented by counsel. *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("It is no doubt true that there are cases in which a litigant proceeding without counsel may make a fatal procedural error . . ."). When a competent adult chooses to proceed without counsel, the adult assumes the risk of mistakes associated with untrained representation. *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F. 3d 552, 561 (6th Cir. 2000) ("In particular, a willfully unrepresented plaintiff volitionally

assumes the risks and accepts the hazards, which accompany self representation."). However, the same does not hold true for a child. As the Second Circuit noted:

> The choice to appear *pro se* is not a true choice for minors who under state law, cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect . . . . It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

Cheung, 906 F.2d at 61 (internal citations omitted); *see also Osei-Afriyie*, 937 F.2d at 882 ("Osei-Afriyie is a well-educated economist. He is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance ever to have any of their claims heard."); *Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.").

This case amply illustrates the point. In the interlocutory appeal, the Sixth Circuit specifically found that a key argument framed by counsel subsequently retained by Petitioners (asserting that Jacob's stay-put placement should have been at Monarch) was never raised below when Petitioners proceeded without counsel: "The problem with this argument is that the Winkelmans never presented it to the district court. . . ." *Winkelman*, 166 Fed. Appx. at 810. Aside from that point, Petitioners could advance "no other tenable arguments for reversing the district court's decision. . . ." *Id.* at 811. As a result, their lawyer's subsequent perceptiveness could not erase

the damage that the Winkelmans caused to Jacob's case while proceeding *pro se*.

Having the foresight to make appropriate legal arguments is not the only benefit attorneys bring to the process. Attorneys inject a measure of objectivity often lacking in an area punctuated by emotion. Appreciating this fact, the Fourth Circuit refused an award of fees under IDEA to an attorney parent because "children deserve independent legal services" in order to ensure that "'reason rather than emotion' will dictate the conduct of the litigation." *Doe v. Board of Educ. of Baltimore Cty.*, 165 F.3d 260, 263-64 (4th Cir. 1998), *cert. denied*, 526 U.S. 1159 (1999); *see also Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1091 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist*, 448 F.3d 601, 603 (2d Cir. 2006); *Woodside v. School Dist. of Philadelphia Bd. of Educ.*, 248 F.3d 129, 130 (3d Cir. 2001). When emotion rather than reason prevails, it inflicts harm on both the parties and the court.

3. The common law rule also reflects deference to the States' interest in regulating the practice of law. The Third Circuit emphasized this state interest, explaining that "there is a strong state interest in regulating the practice of law." *Collinsgru*, 161 F.3d at 231. The Sixth Circuit echoed these concerns: "We also note that this conclusion comports with principles of federalism insofar as allowing non-lawyers to represent IDEA plaintiffs would undermine the States' strong interest in regulating the practice of law." *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756 (6th Cir. 2005). This interest is designed to protect all parties to litigation: "Requiring a minimum level of competence protects not only the party that is being represented but also his or her adversaries and the courts from poorly drafted, inarticulate, or vexatious claims." *Collinsgru*, 161 F.3d at 231. Congress should not be held to have intruded on such an important state interest unwittingly.

B. Congress Did Not Abrogate the Common Law Rule

As this Court has recognized, "in order to abrogate a common-law principle, the statute must '*speak directly*' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (emphasis added).[2] This Court applied a similar analysis in *Schaffer* when assessing whether Congress had altered the background default rule on the burden of persuasion. *See Schaffer v. Weast*, 126 S. Ct. 528, 534-35 (2005). Moreover, a "party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). Petitioners do nothing to overcome their burden here.

1. IDEA says nothing about the right of parents to proceed *pro se* in federal court. *See Cavanaugh*, 409 F.3d at 756 ("The Cavanaughs can point to no language in the IDEA that abrogates the common law rule that non-lawyers may not represent litigants in court."). Such silence falls well short of "speaking directly" to this issue. *See Texas*, 507 U.S. at 534; *Schaffer*, 126 S. Ct. at 534-36.

In administrative proceedings under the IDEA, Congress expressly allowed non-attorneys to prosecute and defend due process hearings. *See* 20 U.S.C. § 1415(h). By allocating some such rights in the administrative setting, it is difficult to imagine that Congress meant to instill greater rights in federal proceedings through its silence on this issue. Congress' specific inclusion of the right to lay representation in IDEA administrative hearings and appeals, combined with its exclusion of this right from the provision governing civil actions, *id.* at § 1415(i), provides compelling evidence of a

---

[2] This standard parallels the "clear statement" rule mandated by the Spending Clause, as described below. Under either analysis, Petitioners bear the burden of demonstrating clear language in the statute that would permit parents to represent their child *pro se* in federal court.

deliberate omission and a quintessential opportunity for the application of the canon of *expressio unius est exclusio alterius*. *See Russello v. United States*, 464 U.S. 23 (1983) (holding that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

This Court has recently explained that *expressio unius* "has force" when the items addressed "are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (*quoting United States v. Vonn*, 535 U.S. 55, 65 (2002)). Here, the canon carries particular force when applied to the series of IDEA enforcement mechanisms – administrative due process hearings, administrative appeals, and civil actions.

2. Lacking any clear language to abrogate the common law rule, Petitioners seek to carve a novel exception to it. Pet. Br. at 37-43. They suggest that because some courts permit non-attorneys to prosecute Social Security Income (SSI) appeals, this Court should embrace a similar exception for IDEA cases. Yet their analogy to SSI cases falls apart upon a glance at their key case, *Maldonado v. Apfel*, 55 F. Supp. 2d 296 (S.D.N.Y. 1999), which specifically distinguished SSI cases from IDEA matters: "IDEA claims and SSI claims are sufficiently dissimilar to justify a different result." *Id.* at 304. IDEA proceedings "are considerably more involved than the review of an administrative record in SSI appeals," and implicate a much more nuanced question than whether benefits are owing: not "whether the child has the right to an education, but rather the *type* of education to which the child is entitled." *Id.* at 304 & n.10 (emphasis added).

When a non-attorney represents a party in SSI cases, the regulations require the court to ensure that the non-attorney

"meets basic standards of competence," and to "continually assess" whether counsel should be appointed. *See Machadio v. Apfel*, 276 F.3d 103, 107-08 (2d Cir. 2002) (*citing* 20 C.F.R. § 416.1505). Similar safeguards do not exist under IDEA or its regulations, nor do Petitioners appear to urge the fact-intensive SSI inquiry. Rather, they seem to prefer a blanket rule authorizing parents to represent their child in all IDEA actions. Consistent with the very authority featured by Petitioners, this Court should decline to fashion such a rule.

C. Congress Recently Considered and Rejected Inclusion of Clear Language in IDEA Permitting Parents to Represent Their Child *Pro Se*

Congress's recent rejection of a new provision that would have given non-attorney parents the right to represent their children in court confirms its intent to adhere to the common law rule. Although the Senate passed such a provision, it was specifically rejected in the House-Senate conference committee and never enacted into law.

1. In 2003, Congress reviewed the IDEA and considered various amendments as part of the reauthorization process. *See generally* S. Rep. No. 108-185 108th Cong., 1st Sess. (2003). The Senate included a new parent *pro se* provision in its IDEA bill that addressed the very issue framed by Petitioners: "a parent of a child with a disability may represent the child in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004).

The Senate committee that originally adopted the parent *pro se* provision highlighted the basic common law rule that parents cannot represent their children *pro se*. *See, e.g.*, S. Rep. No. 108-185 108th Cong., 1st Sess., at 41. The committee also appreciated the circuit split: "The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have

decided this issue based upon a distinction between procedural and substantive claims brought by a parent." *Id.* Indeed, the First Circuit was the only circuit to recognize a substantive right of parents under IDEA; thus, it stands to reason that the committee understood that most courts would not permit such action. Despite this knowledge, Congress passed the version of the statute that specifically omitted the Senate's *pro se* parent authorization. Council Br. at 6-9.

2. Although Petitioners discount the significance of Congress's rejection of the Senate proposal, as this Court recently explained: "To be sure, we have sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the 'precise issue' presented before the Court. . . ." *Rapanos v. United States*, 126 S. Ct. 2208, 2231 (2006) (*quoting Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983)); *see also Bob Jones Univ.*, 461 U.S. at 601 ("Nonaction by Congress is not often a useful guide, but the nonaction here is significant."). Here, the "precise issue" before this Court – whether non-attorney parents should have the right to represent their child in IDEA civil actions – was considered by Congress. The fact that Congress rejected this language in the reauthorized IDEA is a testament to its intent to uphold the common law rule.

Because Congress rejected this approach in line with the weight of judicial authority, S. Rep. No. 108-185 108th Cong., 1st Sess., at 41, Petitioners' point that "several equally tenable inferences may be drawn from such inaction," *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990), fails to resonate. If Congress truly intended to confer substantive rights to parents or to allow them to represent their child, the judicial denunciation of these positions should have galvanized it into action. At a minimum, it cannot be said that Congress labored under the misperception that the statute provided parents with such rights in the face of the caselaw it referenced.

3. The failed Senate amendment also provides a stark contrast with the present language in the statute by demonstrating what would be necessary to "speak directly" to the question presented. In order to abrogate the common law or impose obligations on the States under the Spending Clause, Congress must speak clearly and with precision. It did just that in the proposed amendment that would have been Section 1415(i)(2) had it not been rejected by the House-Senate conference committee. Its failure to do so in the statute actually enacted, therefore, must be given due consideration by this Court. *Cf. Dellmuth v. Muth*, 491 U.S. 223, 229 (1989) ("[W]e note that a comparison of the language in the amendments with the language of the EHA serves only to underscore the difference in the two statutes, and the absence of any clear statement of abrogation in the EHA."); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 23 (1981) ("When Congress intended to impose conditions on the grant of federal funds. . . it proved capable of doing so in clear terms.").

D. Children's Rights Are Protected Both by Congress and the Federal Rules

Congress did not need to abrogate the common law rule because it took other steps to protect the child's rights, and existing procedural rules ensure a threshold level of protection. In IDEA, Congress permitted an award of attorney's fees in order to encourage the participation of counsel. *See* 20 U.S.C. § 1415(i)(3)(B); *Doe*, 165 F.3d at 264 (IDEA permits attorneys' fees because "children deserve independent legal services"). Congress also permitted grants to "parent organizations," which would, among other things, provide guidance to parents involved in disputes under IDEA. 20 U.S.C. § 1471. Local education agencies also "must inform the parent of any free or low-cost legal and other relevant services available in the area. . ." 34 C.F.R. § 300.507(b).

Children may also avail themselves of FED. R. CIV. P. 17(c), which provides that "whenever an infant or incompetent person has a representative, such as a general guardian . . . the representative may sue or defend on behalf of the infant or incompetent person." FED. R. CIV. P. 17(c). As numerous courts have concluded, this rule allows the guardian to sue on the incompetent person's behalf, but it does not permit a non-attorney guardian to represent the child in court. *See Johns*, 114 F.3d at 876-77; *Devine*, 121 F.3d at 581-82; *Osei-Afrivie*, 937 F.2d at 882; *Cheung*, 906 F.2d at 59; *Meeker*, 782 F.2d at 154; *see also* SG Br. at 10-11 n.3 (where parents "sue solely as representatives of their children under Rule 17(c), the parents are not 'parties' who are 'conduct[ing] their own cases' for purposes of 28 U.S.C. 1654, and they may not represent other individuals, including their children, in court"). Moreover, Rule 17(c) directs courts to take necessary actions to protect the interests of minors: "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or *shall make such other order as it deems proper for the protection of the infant or incompetent person.*" FED. R. CIV. P. 17(c) (emphasis added).

The Second Circuit illustrated the protections of Rule 17(c) in an IDEA context, attributing error to the district court for failing to consider the need for the appointment of counsel for the child. *See Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999) ("The court has a duty to enforce the *Cheung* rule *sua sponte*, for 'the infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him.'"). It accordingly remanded with instructions to evaluate the child's need for counsel and, as part of its determination, to take into account his inability to proceed unless counsel was appointed. *Id.* Courts have thus exhibited the flexibility and practicality

that one would expect in applying this rule to protect the rights of minors.

Petitioners and their *amici* argue that if children cannot be represented by their parents, school districts will be able to obtain default judgments by appealing adverse administrative determinations to court. The Federal Rules of Civil Procedure operate to prevent exactly that scenario. FED. R. CIV. P. 55(b), working in tandem with Rule 17(c), does not allow default judgments to be taken against infants or incompetents unless a representative has appeared on their behalf. Thus, courts play an important role in protecting the interests of minors in accordance with Rules 55 and 17(c), confirming that the dire predictions of default judgments ring hollow.

II. Congress Provided Substantive Rights to Children With Disabilities and Did Not Grant Their Parents Judicially Enforceable Rights

Unable to find any language abrogating the common law ban on *pro se* parental representation, Petitioners offer a fall-back argument that sweeps even more broadly, claiming that they possess independently redressable rights. Yet this approach is nothing more than an attempt to recast the first argument. Petitioners' vision of "ensuring" the provision of a FAPE, Pet. Br. at 30, essentially means that they can represent their child in court, which, as demonstrated above, they cannot do. Smuggling this argument in through the guise of "substantive rights" requires Petitioners to knit together various provisions pulled from the crevices of the statute to create their "substantive" right. Employing such methods is a hazardous exercise, as explained by Justice Frankfurter: "And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendos of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere

rendering becomes creation and attempted interpretation of legislation becomes legislation itself." *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939).

A. The Purpose of the IDEA is to Provide Children with Disabilities a Free Appropriate Public Education

IDEA reflects a congressional focus on the substantive rights of children with disabilities. *See, e.g., Board of Educ. of Comm. Consolidated Sch. Dist. v. Illinois State Bd. of Educ.*, 938 F.2d 712, 717 (7th Cir. 1991) (recognizing that the "EHA makes clear" that children's interests, not parents', "must be paramount"). The opening section emphasizes the "national policy" of "[i]mproving educational results for children with disabilities," 20 U.S.C. § 1400(c)(1), a purpose long recognized by this Court. *See, e.g., Arlington*, 126 S. Ct. at 2465 (Ginsburg, J., concurring) (describing the "overarching goal" of IDEA as "to provide a 'free appropriate public education' *to children with disabilities*") (emphasis added); *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982) ("By passing the Act, Congress sought primarily to make public education available to handicapped children.").

Petitioners cannot escape the fact that when they submitted the due process complaint in this matter, they requested Respondent "provide a free, appropriate, public education for my child, Jacob Winkelman, who has a disability." Resp. Br. at 1a. That sentence encapsulates what IDEA is about – protecting the substantive rights of children and tailoring their education to best promote their needs. As the Fourth Circuit explained, "[p]lainly the focus of the IDEA is the educational needs of the child, not the parents. State officials are charged with formulation of an individualized education plan for the child, not the parents. The adequacy of such a plan is determined by how appropriately it meets the needs of the child, not the parents." *Doe*, 165 F.3d at 262. Undeterred, Petitioners

request that this Court extend the right to a FAPE to them. Pet. Br. at 30-31.

1. The heart of the statute and the true substantive right it creates is that a free appropriate public education must be available to "children with disabilities" who are "between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). The statute frequently invokes the "right of a child with a disability" to receive a free appropriate public education. *See, e.g.*, 20 U.S.C. § 1408(a)(2)(C)(i); 1411(e)(3)(F)(i), 1412(a)(1)(A); 1415(b)(6). And when Congress spoke of the "obligation" to make a FAPE available and "provid[ing]" a FAPE, it kept the focus on "children with disabilities" alone. *See, e.g.*, 20 U.S.C. § 1412(a)(1)(B) ("[t]he obligation to make a free appropriate public education available to all children with disabilities"); § 1412(a)(5)(B)(i) ("provide a child with a disability a free appropriate public education"); § 1412(a)(10)(C)(ii) ("made a free appropriate public education available to the child"); § 1412(a)(11)(B) ("a free appropriate public education for any child with a disability"); § 1412(a)(12)(A)(i) ("to ensure a free appropriate public education to children with disabilities"); § 1414(a)(1)(D)(i)(II) ("making a free appropriate public education available to a child with a disability"). Petitioners ask this Court to rewrite the statute to mandate that a FAPE be made available to "children with disabilities *and their parents.*"

Congress, however, declined to include such language. Instead, the statute focuses on the child and the steps necessary to provide a FAPE, emphasizing the need to protect children's interests. For example, to effectuate IDEA's purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), states are charged with locating children with disabilities by adopting procedures that ensure that "all *children with disabilities* . . . who are in need of special education and related services, are identified, located, and evaluated." 34 C.F.R. § 300.111(a)(i) (emphasis added); 20 U.S.C. §

1412(a)(3). A child suspected of having a disability is entitled to an evaluation that determines whether he is a "child with a disability" as defined by the IDEA and that assesses his educational needs. 34 C.F.R. §§ 300.301, 300.306; 20 U.S.C. § 1414(a), (b).

Any "child with a disability" as defined by IDEA who "needs special education and related services" is entitled to a FAPE. 34 C.F.R. § 300.306(c)(2); 20 U.S.C. § 1414(d). The IEP sits as the cornerstone for the provision of a FAPE. It details the child's present levels of performance, educational needs, educational goals and objectives, and the special education and related services that will be provided to meet the child's needs. 34 C.F.R. § 300.320; 20 U.S.C. § 1414(d). The child's "IEP Team," as defined by 20 U.S.C. § 1414(d)(1)(B), must formulate an educational plan for the child that furthers the child's needs. *Id.* at § 1414(d)(1)(A)(i)(II).

2. Federal and state oversight of IDEA compliance predictably focuses upon "improving educational results and functional outcomes for all children with disabilities. . . ." *Id.* at § 1416(a)(2)(A). For that reason, Congress took care to restrain the ability of regulators to infringe on children's rights: IDEA explains that the Secretary of Education may not implement any regulation that "procedurally or *substantively* lessens the protections provided to children with disabilities under this chapter. . . except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation." 20 U.S.C. § 1406(b)(2) (emphasis added). Importantly, this provision, which limits the Secretary's authority regarding regulations, says nothing about any substantive rights possessed by parents. The same holds true for the section regarding state administration. State regulations and policies must help "enable children with disabilities to meet the challenging State student academic achievement standards." 20 U.S.C. § 1407(b). And States receive grants for the purpose of

"provid[ing] special education and related services to children with disabilities. . . ." 20 U.S.C. § 1411(a)(1).

3. The entire framework of dispute resolution under IDEA likewise revolves around the child's rights. In order to initiate an impartial due process hearing, a complaint must be filed in accordance with Section 1415(b)(6)(A). *See* 20 U.S.C. § 1415(f)(1)(A).[3]

Subsection (b)(6)(A) demarcates the permissible boundaries of an IDEA complaint. A complaint may be initiated "with respect to any matter relating to the identification, evaluation, or educational placement *of the child*, or the provision of a free appropriate public education *to such child*," and must include, among other things, "a description of the nature of the *problem of the child* relating to such proposed initiation or change. . . ." 20 U.S.C. § 1415(b)(6)(A) (emphasis added)[4]; § 1415(b)(7)(A)(ii)(III) (emphasis added). IDEA civil actions are likewise limited to adjudicating matters "with respect to the complaint presented pursuant to this section. . . ." *Id.* at § 1415(i)(2)(A); *see also* Pet. Br. at 35 ("Congress necessarily contemplated that the complaint would frame the universe of claims eligible for any . . . judicial review under § 1415(i)(2)(A).").

At the due process hearing, the hearing officer's decision must "be made on substantive grounds based on a determination of whether the child received a free appropriate public education." *Id.* at § 1415(f)(3)(E)(i). This further illustrates IDEA's emphasis on the substantive rights of

---

[3] That provision also references a complaint under Section 1415(k), which pertains to a child who violates a code of student conduct. The action in the present case was initiated pursuant to subsection (b)(6)(A), rather than subsection (k).

[4] The limits placed by subsection (b)(6)(A) contrast with, for example, the scope of the right to mediation. *See* 20 U.S.C. § 1415(e). Under those provisions, "disputes involving any matter" can be resolved through mediation. *Id.* at § 1415(e)(1).

children with disabilities. Indeed, the ensuing subsection on procedural violations explains that only certain procedural violations can rise to the level that would cause a hearing officer to "find that a child did not receive a free appropriate public education. . . ." *Id.* at § 1415(f)(3)(E)(ii).

Every aspect of dispute resolution hinges on the child's substantive right to a FAPE, rather than any notion of parental rights. Petitioners recognized the intent of the statute when they tailored their complaint in this matter to redressing harm to Jacob rather than seeking relief for a violation of parental "rights." Petitioners' due process complaint opened by requesting a hearing to "challenge the Parma City School [D]istrict . . . to provide a free, appropriate, public education *for my child, Jacob Winkelman*, who has a disability." Resp. Br. at 1a (emphasis added). The complaint went on to allege that Parma lacked a suitable program that provided "the needed intervention and support for *my child, Jacob Winkelman*. . . I feel the school is not providing *my child with a free, appropriate, public education*." *Id.* (emphasis added). Nowhere in this complaint did Mr. and Mrs. Winkelman assert their own right to a FAPE – the very right they implore this Court to create.

After the impartial hearing officer ruled that Respondent had offered a FAPE "to the child," JA at 111, Petitioners sought review at the state level. That proceeding was captioned: "In the Matter of Jacob Winkelman, Student" and referred to Jacob as "Petitioner/Appellant." JA at 114. Jacob's parents are not mentioned in the caption of the appeal. Such a caption illustrates, at a minimum, that the state-appointed hearing officers who apply this statute on a daily basis understand that IDEA is for the benefit of the child. Even more importantly, the administrative decisions focus exclusively on Jacob's interests and needs, not those of his parents. JA at 21-158.

Before this Court, however, Petitioners obscure the impact of Section 1415(b)(6)(A) by portraying it as placing "no limit on the bundle of claims that a party may bring." Pet. Br. at 35. Yet it certainly confines the scope of available claims to those related to the child's identification, evaluation, placement, or the provision of a FAPE, and limits relief to situations in which the child has been denied a FAPE. Congress's decision not to include any reference to parental rights in this provision must be respected.

Section 1411(e)(3)(E) also reflects Congress's desire to limit due process proceedings to claims involving a child's substantive rights. In that provision regarding legal fees, Congress provides that certain of its funding "shall not support legal fees, court costs, or other costs associated with a cause of action brought *on behalf of a child with a disability* to ensure a free appropriate public education for such child." (Emphasis added). Consistent with Section 1415(b)(6)(A), the emphasized language confirms that any action brought to secure a FAPE must be initiated on the child's behalf.

B. Parental Safeguards Under IDEA Are Collateral, Not Independent Substantive Rights

By granting children the substantive right to a FAPE, Congress made them the real party in interest in IDEA litigation. Parents, by contrast, received collateral tools related to the child's underlying substantive rights – not freestanding or independently enforceable rights. *See, e.g., Cavanaugh*, 409 F.3d at 757 ("[T]hese procedural rights exist only to ensure that the child's substantive right to a FAPE is protected and do not confer on the parents a vicarious, substantive right to a FAPE."). IDEA ensures the availability of a FAPE to children with disabilities – everything else is ancillary.

1. Congress's decision to limit the rights available to parents is sensible, particularly in light of IDEA's expansive

definition of "parent." *See* 20 U.S.C. § 1401(23). It includes not only natural parents (such as Mr. and Mrs. Winkelman), but also foster parents, guardians, any individual acting in the place of parents with whom the child lives (as IDEA explains, "including a grandparent, stepparent, or other relative"), an individual "who is legally responsible for the child's welfare," and a surrogate parent.[5] *Id.* Given this expansive definition, as well as the potential for the child's "parent" to change from time to time, one can appreciate congressional reluctance to instill "parents" with substantive rights. The members of Congress submitting an *amicus* brief illustrate the confusion attendant with extending independent rights to parents. They assert that certain "parents" have the right to pursue substantive claims on their own behalf, but that children who have "legal guardians or foster parents" would have to avail themselves of FED. R. CIV. P. 17(c). Cong. Br. at 19 n.6. Therefore, despite the broad definition of "parents" contained in the statute, the rule espoused by Petitioners would apparently only benefit certain categories of "parents" but not others. Such line-drawing will ensure that school districts become mired in the middle of family disputes. *See* NSBA Br. at 16-17.

2. Section 1415(m) of IDEA also compels the conclusion that parental rights are both derivative and transitory. Under this section, States may provide that, upon the attainment of the child's majority, "all other rights accorded to parents under this subchapter transfer to the child,"[6] 20 U.S.C. § 1415(m)(1)(B), and that "the agency shall notify the individual and the parents of the transfer of rights."[7] *Id.* at § 1415 (m)(1)(C). If Congress

---

[5] Surrogate parents are individuals appointed by the local educational agency who meet certain qualifications and who are paid by the agency. *See* 34 C.F.R. § 300.519.

[6] "Subchapter" refers to "Subchapter II" of IDEA, which encompasses 20 U.S.C. § 1411 through § 1419 (and thus virtually every statutory provision featured by Petitioners).

[7] A child may receive services under IDEA until reaching the age of 22. *See,*

desired to confer independent substantive rights upon parents, one would not imagine that it would so readily strip them of these rights. Instead, Section 1415(m) illustrates that Congress appreciated the practical reality that children lack capacity to consummate certain transactions: "Though parents have some rights under the IDEA, the child, not the parents, is the real party in interest in any IDEA proceeding. The references to parents are best understood as accommodations to the fact of the child's incapacity. That incapacity does not collapse the identity of the child into that of his parents." *Doe*, 165 F.3d at 263. In other words, once the impediment of incapacity is removed, the child no longer needs the parent to assist in exercising his rights.

The First Circuit in *Maroni* utilized Section 1415(m) as part of the underpinning for its decision that parents enjoy substantive rights under IDEA. *Maroni v. Pemi-Baker Reg'l Sch.*, 346 F.3d 247, 251 (1st Cir. 2003). Perhaps the reason *Maroni* stands alone as the only circuit case to reach such a result stems from its flawed premise. The court described Section 1415(m) as "permit[ting] *parents* to transfer this right . . . to their child" who has attained the age of majority. *Id.* (emphasis added). Petitioners perpetuate the same error in their brief. Pet. Br. at 42. The statute, however, gives *States* the right to transfer parents' rights – it does not reserve that discretion to the parents, which causes much of the rationale of *Maroni* (and by extension, that of Petitioners) to unravel.

To illustrate, Ohio's regulations on this subject explain that the transfer is automatic: "At least one year before a student reaches the age of majority. . . the student shall be informed of his or her rights that *will transfer* to the student on reaching the age of majority." OHIO ADMIN. CODE 3301-51-05(J)(1)

---

e.g., 20 U.S.C. § 1412(a)(1)(A). Thus, it would be illogical to provide a parent with a joint substantive right to a FAPE until the child turned 18 only to remove this right during the child's last three years of services.

(emphasis added); *see also* 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(cc). It is the school district's obligation to "ensure that all rights accorded to parents. . . transfer to the student." OHIO ADMIN. CODE 3301-51-05(J)(2). In fact, the only way for a parent to halt the transfer is to initiate a judicial proceeding to have the child declared incompetent. *Id.* As this regulatory scheme attests, Section 1415(m) does not give parents the option of transferring their rights; it gives States the ability to require and effectuate such a transfer.

3. The dispute resolution mechanisms under IDEA underscore the conclusion that parents are not real parties in interest. As explained above, the purpose of an IDEA due process hearing (and any ensuing litigation) is to settle disagreements regarding a *child's* educational program, not to create a fountain of rights for parents. For that reason, the references to "parents" seized upon by Petitioners and their *amici* in the context of IDEA administrative proceedings, *see* 20 U.S.C. § 1415(b)(8), 1415(c)(2)(B), 1415(d)(2), 1415(o), Pet. Br. at 17-19, effectively treat the parent as the child's "next friend" akin to the procedures under FED. R. CIV. P. 17(c). *See, e.g.*, 20 U.S.C. § 1415(m), 1411(e)(3)(E), 1415(b)(6)(A). Allowing a parent to request a hearing regarding the child's right to a FAPE is a mechanism to ensure protection of the child's rights despite a lack of capacity. *See Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299 (4th Cir. 2005) (recognizing that a parent's procedural rights "stem solely from their disabled child's inability to pursue a remedy due to his incapacity"); *Doe*, 165 F.3d at 263; *Cavanaugh*, 409 F.3d at 757 ("[T]he intended beneficiary of the IDEA is not the parents of the individual with a disability, but the disabled individual.") (citation omitted).

The Solicitor General suggests that there is no "practical reason" why Congress would permit parents to proceed *pro se* in administrative proceedings but not in federal court. SG Br.

at 14; *see also* Pet. Br. at 18 n.13. Yet the administrative proceedings are, by nature, designed to be a less formal and more expedient method of dispute resolution. *See Schaffer*, 126 S. Ct. at 536 ("IDEA hearings are deliberately informal. . . ."). Once the matter arrives in court, as the record in this case attests, IDEA and procedural rules will present a maze of requirements that *pro se* litigants will often have trouble navigating. *See Collinsgru*, 161 F.3d at 236. Congress was certainly entitled to conclude that parents should not proceed *pro se* in court to enforce their child's substantive rights under IDEA, which may explain why it allowed for attorneys' fees to entice the participation of counsel. *See Arlington*, 126 S. Ct. at 2461 (recognizing that there may be "many reasons why Congress" structured IDEA as it did).

Contrary to Petitioners' view, the congressional choice to permit attorneys' fees cannot be twisted into a basis for guaranteeing parents the right to proceed *without counsel*.[8] *See, e.g.*, 20 U.S.C. § 1415(i)(3)(B)(i)(I) (attorneys' fees awardable "to a prevailing party who is the parent of a child with a disability"); § 1415(i)(3)(D) and (F). Rather, Congress provided for attorneys' fee awards to facilitate attorney involvement, not as a means for ensuring *pro se* litigation.

The attorneys' fee provisions confirm the derivative nature of parental safeguards (an award of fees, after all, depends on the predicate finding that the *child* was denied a FAPE) and further

---

[8] Equally perplexing is Petitioners' reliance on provisions explaining that certain rights of action *are not* created by the statute in order to prove to the Court that they possess independently enforceable rights. *See* 20 U.S.C. § 1401(10)(E), § 1412(a)(14)(E) ("Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter," certain actions cannot be maintained). By clarifying in these sections certain rights of action that could not be maintained, Congress should not be held to have inadvertently created other rights of action (particularly since Section 1401(10)(E) references rights of action under Subchapter I, which are nonexistent).

reflect Congress's appreciation of the practical reality that children lacked capacity to initiate their own lawsuits, which meant that others must act on behalf of the child. *See, e.g., Doe*, 165 F.3d at 263.[9] It is not necessary to divine congressional intent to reach this conclusion, because Congress expressly acknowledged that IDEA claims would be brought on behalf of children with disabilities. *See* 20 U.S.C. § 1411(e)(3)(E) (providing that certain funding "shall not support legal fees, court costs, or other costs associated with a cause of action brought *on behalf of a child with a disability* to ensure a free appropriate public education for such child") (emphasis added); *see also* 20 U.S.C. § 1415(b)(6)(A), (m). As this Court in *Schaffer* explained, the "party seeking relief" in that case "is Brian, as represented by his parents," who proceeded through counsel. *Schaffer*, 126 S. Ct. at 537; *see also* Resp. Br. at 1a; JA at 114.

Likewise, none of the provisions regarding reimbursement for tuition exist but for the *child's* underlying substantive right to a FAPE. *See* Pet. Br. at 32; 20 U.S.C. § 1412(a)(10). Although the statute speaks in terms of "reimburs[ing] the parents," it clarifies that the right to reimbursement is, at best, derivative because it only arises upon a finding "that the agency had not made a free appropriate public education available *to the child* in a timely manner" prior to the child's enrollment in a private school. *Id.* at § 1412(a)(10)(C)(ii) (emphasis added); *see also* § 1415(b)(6)(A); § 1415(f)(3)(E). Therefore, the child

---

[9] The same reasoning applies with respect to settlement agreements, which Petitioners present as further proof that parents are the real parties in interest. Giving parents the right to execute a settlement agreement to resolve the impartial due process hearing, 20 U.S.C. § 1415(f)(1)(B)(iii), is nothing more than a recognition that a child, as a minor, could not execute a binding contract. Because the relief is directed towards the child, rather than the parent, as confirmed by 20 U.S.C. § 1415(b)(6)(A), such provisions about settlement agreements reinforce Respondent's position.

remains the real party in interest to any such action as any reimbursement is premised on his injury.[10]

This is particularly so because any claim for reimbursement flows from the parent's act of removing the child from a school that they believe is not providing a FAPE, which this Court has recognized is a risk assumed by the parents. *See School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985). The potentially divergent interests between a parent seeking pecuniary relief and a child who has been displaced from the public schools further highlights the need for objective counsel from an attorney. Unfortunately, this case bears out that concern, as Mr. and Mrs. Winkelman elected not to send Jacob to school at all during the 2004-05 school year in the hopes that an administrative officer or court would order him sent to private school. Their quest for pecuniary relief while they deny Jacob access to public schools highlights, at a minimum, the need for independent counsel standing up for his rights.

The fact parents may initiate a due process complaint and become involved in that process does not cloak them with real party in interest status under IDEA. *See Cavanaugh*, 409 F.3d at 757 ("[W]e hold that the right of [a] disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents."). Congress could have clarified that *parents* could seek certain relief under this provision for harm to themselves, but it declined to do so. *See* 20 U.S.C. § 1415(b)(6)(A); § 1411(e)(3)(E). Because Section 1415(b)(6)(A) confirms that due process complaints are limited to issues involving the child's identification, evaluation, placement, and the provision of a FAPE, references to a parent's role in the complaint

---

[10] Petitioners' reading of the reimbursement provisions would yield absurd results, as it would bar recovery by a child when someone other than the "parent" paid for the tuition.

process are insufficient to supplant the child as the real party in interest.

C. Congress Described Parental Safeguards as "Procedural"

Congress did not grant parents broader substantive rights than the derivative procedural safeguards actually enumerated in the statute. Nevertheless, Petitioners insist that "parents also have a substantive right under IDEA to a free appropriate public education for their child," Pet. Br. at 31 (emphasis omitted), a point echoed by the Solicitor General: "parents share with their child the substantive right under the statute to a free appropriate public education." SG Br. at 7.

For good reason, Petitioners do not elaborate on how a parent's substantive right to a FAPE could be applied. Must school districts prepare an IEP that addresses the parent's needs (that may not align with the child's needs) or provide services designed to assist the parent in caring for the child? Petitioners' reading would confound school districts and the judiciary alike, as they would struggle to determine how to apply to parents a statute designed to enhance the educational opportunities of children.

Petitioners then vary the theme, asserting the substantive right to "ensur[e] that their child is receiving IDEA's statutorily-guaranteed FAPE." Pet. Br. at 30. This approach fares no better, as it simply recasts as "substantive" the safeguards that Congress deemed "procedural" in Section 1415. Transforming such procedural safeguards into independently enforceable substantive rights through a parsing of the statute is the precise ill against which this Court cautioned in *Palmer*. *See Palmer*, 308 U.S. at 83.

1. When Congress spoke about safeguards provided to parents under the statute, it generally classified them as "procedural." Indeed, as this Court has recognized under

IDEA's predecessor, "the EHA confers upon disabled students an enforceable *substantive right* to public education in participating States," whereas parents receive "various *procedural* safeguards." *Honig v. Doe*, 484 U.S. 305, 310-11 (1988) (emphasis added); *see also Mosely v. Board of Educ. of the City of Chicago*, 434 F.3d 527, 532 (7th Cir. 2006) ("Most of our sister circuits take the position that the IDEA thus confers different rights on children and parents: both substantive and procedural rights for the child, and procedural rights only for the parents.").

Section 1412(a)(6)(A) begins by explaining that "[c]hildren with disabilities and their parents are afforded the procedural safeguards required by section 1415." Similar phrases are echoed throughout the balance of Subchapter II. *See* 20 U.S.C. § 1415(a) (States must "ensure that children with disabilities and their parents are guaranteed procedural safeguards"); § 1415(b) ("[t]he procedures required by this section shall include. . ."); [11] § 1415(d)(1)(A). If parents enjoyed substantive rights, there would be no need to differentiate between procedural and substantive in the statute.

As the text of the statute reveals, Congress knew how to label certain rights as "substantive" when it so desired. Indeed, it did so elsewhere in the IDEA but only in reference to the child – not the parent. *See* 20 U.S.C. § 1406(b)(2); *see also* § 1415(f)(3)(E)(i). Its failure to describe the parental safeguards as "substantive" must be accorded significance, particularly when juxtaposed with its frequent use of the word "procedural."

---

[11] Several of these rights enumerated in Section 1415 parallel rights under the Family Educational Rights and Privacy Act of 1974 (FERPA) that this Court recently found were not enforceable through a private right of action. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *id.* at 293, 295 (Stevens, J., dissenting) (FERPA "includes 10 subsections, which create rights for both students and their parents, and describe the procedures for enforcing and protecting those rights. . . . [FERPA] is directed to the benefit of individual students and parents. . . .").

See, e.g., Arlington, 126 S. Ct. at 2460; *Collinsgru*, 161 F.3d at 227 ("We think, however, that Congress's decision to endow parents with these procedural rights should not be read, under the language of IDEA, to imply that parents also possess the same underlying substantive rights that their children possess.").

Other provisions of the statute validate the role of parent as custodian of procedural safeguards, despite Petitioners' efforts to transform these into substantive rights. Petitioners' reliance on the "participatory guarantees" discussed in *Schaffer* as the building blocks for the substantive right they seek to create reveals the precarious nature of the foundation. Pet. Br. at 34, *quoting Schaffer*, 126 S. Ct. at 532; *see also* SG Br. at 14-15. Respondent does not discount the role of a child's parent. As this Court remarked in *Schaffer*: "The core of the statute, however, is the cooperative process that it establishes between parents and schools. . . Parents and guardians play a significant role in the IEP process." *Schaffer*, 126 S. Ct. at 532; *see also Rowley*, 458 U.S. at 205-06. Yet these points must not be divorced from their context. Giving parents a seat at the table to help formulate the IEP, as referenced in *Schaffer*, is a far cry from imbuing them with the substantive right to a FAPE. The IEP team includes other individuals (such as teachers and school district administrators) who no one pretends possess substantive rights under IDEA. 20 U.S.C. § 1414(d)(1)(B).

The responsibility to develop an IEP lies with the school district – not the child's parent. 34 C.F.R. 300.323. While the parents are one voice on the team, they have no right to veto the IEP or dictate terms of the program. *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003) ("The right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such."); *Schaffer*, 126 S. Ct. at 532. Further, the "adequacy of [an IEP] is determined by how appropriately it meets the needs of the

child, not the parents." *Doe*, 165 F.3d at 262. In this case, for instance, Jacob's parents believed that he should be educated largely in a solitary one-on-one setting. JA 88-97. The educators on his IEP team, however, concluded that Jacob would benefit from greater interaction with his non-disabled peers based on reports from his preschool teacher and formal assessments. The team likewise recognized that Jacob's participation in a special education classroom might ultimately facilitate his assimilation into a traditional classroom setting. JA 96-97. Quite properly, Jacob's interests and needs – and not those of his parents – drove the decision to place Jacob at Pleasant Valley.

Petitioners' search for a substantive right goes well beyond IEP team participation, however, even relying upon references to children "and the families of such children" in the congressional findings set forth at 20 U.S.C. § 1400(c)(3) and a word count of the usage of "families." Pet. Br. at 3. This betrays both the breadth of their proposed rule and the lengths to which they must go to secure it. Hortatory phrases about "families" in the preamble do not provide a basis for substantive rights. *See, e.g.*, Norman J. Singer, *Sutherland Statutes & Statutory Construction*, § 20.3 (6th ed. 2002) ("The function of the preamble is to supply reasons and explanations and not to confer power or determine rights."). But if, in Petitioners' view, "families" serves as a predicate for the creation of rights, then surely it must pave the way for the extension of substantive rights to other family members (however that term might be defined). For example, siblings could suddenly seek relief under the statute, claiming that the denial of FAPE diverted familial resources. Congress did not intend such a perverse result as the statute attests, clarifying that the focus of IDEA remains upon making a FAPE available to "children with disabilities." 20 U.S.C. § 1412(a)(1)(A).

2. Throughout several revisions to the IDEA, one feature of the act has remained constant – the dichotomy between the child's substantive rights and the parent's procedural safeguards. Petitioners' attempts to blur that distinction are unavailing because IDEA, as a whole, confirms that Congress sought to protect children with disabilities and did not grant coterminous rights to their parents.

Nor are the procedural safeguards enforceable independent of the child's substantive right to a FAPE, as Congress recently clarified. *See, e.g., Diamond v. Michigan*, 431 F.3d 262, 266 (6th Cir. 2005) ("[B]efore a plaintiff is entitled to relief for procedural violation under IDEA, the court must determine that a state's procedural violation caused substantive harm."). Under IDEA as reauthorized in 2004, there are now two types of procedural violations - ones that prevent the "child [from] receiv[ing] a free appropriate public education," 20 U.S.C. § 1415(f)(3)(E)(ii), and those that do not affect the provision of a FAPE. *Id.* at § 1415(f)(3)(E)(iii). A hearing officer's decision, however, "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." *Id.* at § 1415(f)(3)(E)(i). In other words, Congress declined to provide for relief for technical procedural violations, and ones serious enough to jeopardize the provision of a FAPE require the child, as the individual possessing the substantive right, to vindicate the right to a FAPE.

D. Parents Do Not Have Independent Redressable Rights Under IDEA to Pursue *Pro Se*

Petitioners build their "substantive right" edifice on "innuendos of disjointed bits of a statute." *Palmer*, 308 U.S. at 83. Nowhere is this more evident than with respect to Petitioners' treatment of "party aggrieved." Petitioners insist that they are "part[ies] aggrieved," capable of initiating their own action *pro se* in federal court pursuant to Section 1415(i)(2)(A).

As explained above, however, parents lack any substantive right under IDEA, and Congress did not permit their procedural safeguards to be independently enforceable. The "party aggrieved" language falls well short of vitiating congressional intent and overturning those twin conclusions.

Petitioners' myopic focus on "party aggrieved" language overlooks these points, as confirmed by their attention to the definition of "aggrieved" from *Black's Law Dictionary*, Pet. Br. at 17, rather than the term "aggrieved party" which appears right below it. *Black's* defines "aggrieved party" as: "A party *entitled to a remedy* . . . ." *Black's Law Dictionary* (8th ed. 2004; emphasis added). Petitioners thus ask the wrong question by focusing on "party aggrieved" because that depends on a predicate that parents have independent and redressable rights. As detailed above, however, every turn in the statute reveals congressional intent that only the child could seek relief for the lost educational opportunities accompanying the denial of a FAPE. *See Doe*, 165 F.3d at 262 ("[T]he child, not the parents, is the real party in interest in any IDEA proceeding."); *Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321, 1323 (11th Cir. 2005) ("[W]e agree with our sister circuits that the 'IDEA's primary purpose is to ensure [a FAPE], not to serve as a tort-like mechanism for compensating personal injury.'").[12]

To the extent that Petitioners seek substantive relief, they cannot invoke the "party aggrieved" language as a bootstrap for rights that otherwise do not exist under the statute. In fact, Petitioners acknowledge that a parent's rights must be "violated" before they can become "aggrieved" and "real parties in interest to any suit to vindicate those rights." Pet. Br. at 30.

---

[12] Similarly, Petitioners miss the mark by suggesting that Respondent desires the "party aggrieved" language contained in Section 1415(g)(1) and Section 1415(i)(2)(A) to mean different things. Pet. Br. at 21-23. Parents are never the real party in interest in either the administrative proceeding or the judicial forum. They are instead pursuing matters on behalf of their child.

Therefore, they tacitly concede that a parent must possess substantive rights before seeking redress for a substantive violation. *Cf. Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990) (recognizing that a party's injury must be "*his* aggrievement, or the adverse effect *upon him*" (emphasis in original)). Petitioners seek to brush by this problem by pointing to *FEC v. Akins*, 524 U.S. 11, 19 (1998), in which this Court commented that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly." Yet neither *Akins* nor other case law permits "party aggrieved" to be wielded as a vehicle for expanding substantive rights beyond those permitted in the underlying statute.

Nor can "party aggrieved" pave the way for judicial actions to enforce procedural rights (to the extent that Petitioners would invite such a result), for the reasons explained above. Procedural ills are not independently enforceable unless they deprive the substantive right to a FAPE, as IDEA confirms in Section 1415(f)(3)(E), which requires the holder of the substantive right to bring the claims. Tellingly, the parents here advanced neither their own substantive right to a FAPE nor did they allege any procedural violations in their due process complaint.[13] Resp. Br. at 1a. Thus, even if parents could in some circumstances constitute a "party aggrieved" for procedural violations, this case presents a poor vehicle for exploring the contours of such a rule because these parents raised no such claims in their due process complaint and have

---

[13] Although Petitioners now allege "procedural" violations, Pet. Br. at 7, their assertion is both untimely and fails to present any cognizable procedural rights. Petitioners did not raise their "predetermination" claim until the case was before the district court, depriving it of jurisdiction on this point. Pet. App. at 10a. Similarly, Petitioners' claims regarding the hearing officer's use of a research assistant and her decision to grant extensions requested by both parties are not recognized in the procedural safeguards afforded by IDEA. 20 U.S.C. § 1415.

never asserted any such claims separate from the claimed denial of a FAPE to Jacob.

For the same reason that "party aggrieved" is irrelevant, Section 1654 of Title 28, which received considerable attention in the briefs of Petitioners and their *amici*, does not answer the threshold question of whether parents possess rights that they can seek to vindicate in federal court. IDEA determines, as described above, the extent of rights possessed by parents. Section 1654, which permits parties to "plead and conduct their own cases personally or by counsel," does not operate to expand the rights granted by IDEA, and Petitioners do not seriously contend otherwise. As described at length throughout this brief, IDEA did not bestow the antecedent rights that Petitioners must establish before reaching the question of Section 1654.

In the end, Petitioners are left to argue that "party aggrieved" must be given their reading in order to comport with the overarching purpose of IDEA. In *Arlington*, however, this Court cautioned against allowing a broad purpose to transcend the language actually employed by Congress: "These goals, however, are too general to provide much support for respondents' reading of the terms of the IDEA. The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations." *Arlington*, 126 S. Ct. at 2463. Such policy-based arguments essentially draw into question the legislative choices made by Congress. Such matters, as the Solicitor General puts it, are "for Congress to decide." SG Br. at 28. The congressional *amici* implore this Court not to burden them with the time consuming and difficult task of amending IDEA. They have good reason to request this Court's intervention given their unsuccessful attempt to amend the statute to permit *pro se* parental representation just two years ago.

Justice Ginsburg captured the point in her concurrence in *Arlington* – even though certain policy objectives "would make good sense in light of IDEA's overarching goal," Congress must actually make the policy choice for itself. *Arlington*, 126 S. Ct. at 2465 (Ginsburg, J., concurring). As a result, "[t]he ball. . . is properly left in Congress' court" to spell out the requirements that will be binding upon the States. *Id.*; *see also Rowley*, 458 U.S. at 200 ("Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act.").

III. Petitioners' Proposed Rules Would Violate The "Clear Notice" Requirement of the Spending Clause

The plain language of IDEA, as explained above, answers both of the questions presented regarding parental *pro se* representation of their child and the creation of substantive rights. *See also Arlington*, 126 S. Ct. at 2464 (Ginsburg, J., concurring) ("[N]o 'clear notice' prop is needed in this case given the twin pillars on which the Court's judgment securely rests."). But there is an additional and independent reason compelling affirmance of the Sixth Circuit – Congress did not employ "clear notice" of the rights sought to be recognized by Petitioners consistent with the mandate of the Spending Clause, U.S. CONST., Art. I, § 8, cl. 1.

This Court has long recognized that the Spending Clause requires that Congress provide clear notice to the States before burdening them with additional conditions, obligations, or liabilities under IDEA and its predecessor statutes. *See, e.g., Arlington*, 126 S. Ct. at 2458-59; *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66, 84 (1999) (Thomas, J., dissenting) ("Because IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction.") (internal citation omitted); *Rowley*, 458 U.S. at 204 n.26 (rejecting argument that Congress could have intended that States maximize each child's

potential because it "has not done so unambiguously, as required in the valid exercise of its spending power").[14] The additional conditions that Petitioners seek to have the Court impose upon the States must accordingly be viewed through the Spending Clause lens, and the "cooperative federalism" model that is the backbone of IDEA, *Schaffer*, 126 S. Ct. at 531, must be honored.

A. Congress Must Provide "Clear Notice" to the States Before Subjecting Them to Conditions, Obligations, or Liabilities

1. In *Arlington*, this Court considered whether expert fees could be recovered as costs under IDEA. This Court began by noting that "Congress enacted the IDEA pursuant to the Spending Clause," which means that "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Arlington*, 126 S. Ct. at 2458-59. "In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case." *Id.* at 2459.

This analysis flows inexorably from the contractual nature of Spending Clause rights and obligations: "Legislation enacted pursuant to the spending power is much in the nature of a contract, and therefore, to be bound by federally imposed conditions, recipients of federal funds must accept them

---

[14] Respondent acknowledges that the Spending Clause was not specifically raised below, but there is no impediment to this Court considering this issue. First, in *Arlington* itself, the Spending Clause had been neither raised nor decided below. Case No. 05-18, Res. Br. at 48; Pet. Reply Br. at 12-13. Second, at the time Respondent here moved to dismiss the appeal, the Sixth Circuit was bound by *Cavanaugh*; thus, the outcome was already dictated by binding precedent. Pet. App. 1a-2a. Third, at the time of the motion to dismiss, *Arlington*, which clarified the interplay between IDEA and the Spending Clause, had not yet been decided. Finally, Petitioners addressed this matter in their brief, and thus anticipated it as an issue properly before the Court. Pet. Br. at 15-16 n.10; SG Br. at 11 n.4.

voluntarily and knowingly." *Arlington*, 126 S. Ct. at 2459 (*quoting in part Pennhurst*, 451 U.S. at 17 (internal quotation marks omitted)).

Surveying the language of IDEA, this Court in *Arlington* found no statutory mandate that States could be responsible for expert costs: "Certainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds." *Arlington*, 126 S. Ct. at 2461. This Court reached that conclusion notwithstanding the fact that the legislative history on this point provided that the "conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses. . . ." *Id.* at 2463 (quoting H.R. Conf. Rep. No. 99-687, at 5). In other words, a clear statement in legislative history cannot substitute for a clear statement in the statute that the States will be bound to adhere to certain conditions: "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Id.* Petitioners' position that that this Court has not held that "the Spending Clause is an independent interpretive lens through which to read a statute" thus runs afoul of this Court's teachings in *Arlington*. Pet. Br. at 15-16 n.10.

2. To avoid the "clear notice" requirement, Petitioners insist that this case does not implicate the Spending Clause at all because a "parent's right to sue *pro se* for an IDEA violation derives from 28 U.S.C. 1654, which is not Spending Clause legislation." Pet. Br. at 15 n.10; *see also* SG Br. at 11 n.4. But Petitioners are not seeking relief under Section 1654, which provides nothing more than "parties may plead and conduct their own cases personally or by counsel. . . ." Instead, they are asking this Court to grant them substantive rights and relief under IDEA, as well as to recognize a private right of action. *See, e.g.*, Pet. Br. at 31 ("[P]arents also have a substantive right

under IDEA to a *free* appropriate public education for their child."); Pet. Br. at 12 (Congress "provid[ed] parents with their own right of action" in IDEA). In fact, Section 1654 precludes parents from representing their child *pro se* (see Part I, *supra*), leaving Petitioners to claim that IDEA carves an exception to the statute. Therefore, Petitioners cannot circumvent the Spending Clause by pointing to Section 1654.

3. The Third Circuit in *Collinsgru* appropriately analogized the request for recognition of joint substantive rights to a request to recognize an implied right of action. *See Collinsgru*, 161 F.3d at 233. The court then searched – in vain – for clear evidence in either the statute or legislative history that Congress intended to imply a cause of action for parents to remedy substantive violations of IDEA.

Particularly in Spending Clause cases, this Court has exhibited reluctance to allow implied rights of action. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (requiring Congress to "speak[] with a clear voice" and "manifest[] an 'unambiguous' intent to confer individual rights"); *id.* at 281 ("Our more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes."). And even "where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* at 284 (*quoting Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (emphasis added by *Gonzaga*)). IDEA contains no "clear" or "unambiguous" directive that parents have a right of action to vindicate their child's rights, which is hardly surprising in light of IDEA's design.

B. Petitioners' Proposed Rule Would Inflict Conditions, Obligations, and Liabilities for which States Did Not Receive Clear Notice

1. Far from imposing an unambiguous directive to further laden States with litigation costs, this Court recognized in *Schaffer* that Congress endeavored to *lessen* this burden: "Congress has also repeatedly amended the Act in order to reduce its administrative and litigation-related costs." *Schaffer*, 126 S. Ct. at 535. It is beyond peradventure that "a great deal is already spent on the administration of the Act. Litigating a due process complaint is an expensive affair, costing schools approximately $8,000-to-$12,000 per hearing." *Id.* Once the case reaches the judicial arena, the litigation costs for school districts soar upwards. *See, e.g.*, NSBA Br. at 25-27; Council Br. at 11-12.

Moreover, as explained above, Congress placed the States on notice that attorneys were not required at the administrative hearing level. 20 U.S.C. § 1415(h)(2). The corresponding failure to specify that parents could either represent their child *pro se* in court or pursue their own substantive rights independent of the rights of their child accordingly assumes significance as this Court recognized in *Arlington*: "[T]he Act contains detailed provisions that are designed to ensure that such [attorney fee] awards are indeed reasonable. The absence of any comparable provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized." *Arlington*, 126 S. Ct. at 2460 (internal citation omitted).

2. The First Circuit in *Maroni* candidly acknowledged that the rule it adopted – and the rule Petitioners urge this Court to adopt – raised "real" "concern[s]" on the part of school districts, which feared that "permitting parents to proceed pro se will mean more meritless IDEA suits will be brought, requiring school districts to hire counsel and placing a considerable burden on their already stretched budgets." *Maroni*, 346 F.3d at

251. A few pages later, it reiterated this point: "Pro se litigants also impose unusual burdens on courts, and there is a desire to save courts and school districts from 'poorly drafted, inarticulate, or vexatious claims.'" *Id.* at 258; *see also Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983) ("[T]he conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court."); SG Br. at 9 (acknowledging that "permitting parents to proceed *pro se* could increase the amount of meritless IDEA litigation").

This case amply illustrates the concerns expressed by the First Circuit. When Petitioners proceeded without counsel, Respondent had to fend off a barrage of meritless (and often procedurally improper) motions that inflicted considerable costs upon it. For example, in the interlocutory appeal to the Sixth Circuit case (Case No. 04-4159), Petitioners filed a *pro se* "Emergency Motion for an Injunction Pending Appeal" without requesting a stay from the district court, followed shortly thereafter by an "Emergency Motion for a Temporary Injunction Pending Adjudication of Request for Permanent Injunction." Neither motion complied with Sixth Circuit procedures, which prompted the Sixth Circuit to fault Petitioners' noncompliance with these procedures in denying these requests. (Case No. 04-4159, Sixth Circuit Order dated Nov. 4, 2004). In the meantime, however, Respondent incurred substantial attorneys' fees in opposing such meritless filings.

Similarly, before the district court, Petitioners sought sanctions *pro se* under FED. R. CIV. P. 11 against Respondent's counsel for "perpetrat[ing] a fraud upon" the court in connection with some affidavits that Respondent filed. (Doc. No. 15). Petitioners neglected to comply with the safe harbor provision of Rule 11, however, prompting the court to deny the motion for failing to adhere to the "procedural mandates" of Rule 11. (Doc. No. 34). The court further noted that even

compliance with the procedural requirements would not have obtained a different result because Petitioners' "subjective[] disagree[ment]" with facts contained in an affidavit falls well below the threshold for Rule 11 sanctions.

After judgment below, Petitioners filed a *pro se* motion for relief from judgment under FED. R. CIV. P. 60(b) premised on their belief that hearing officer failed to include certain documents in the administrative record. (Doc. No. 43, filed July 25, 2005). Apparently, Petitioners had not checked the court's files before filing such a motion, because the documents were contained in the record. (Doc. Nos. 45 and 46). As the court explained in denying relief, "the Court staff personally checked the administrative record on file with the Clerk of Courts. . . and confirmed that the administrative record does, in fact, include the Plaintiffs' post-hearing brief and exhibits filed with the initial hearing officer." (Doc. No. 46, Order entered Aug. 8, 2005). Respondent also had to incur the time and expense of validating the record and drafting an opposition to what essentially was a frivolous motion. (Doc. No. 45). The penchant for *pro se* litigators to seize on an idea and serve a pleading without verifying the facts or law is well-chronicled. Council Br. at 15-17, 21-22. Such actions are not mere annoyances; they waste the scarce resources of school districts and the judiciary.

Aside from defending *pro se* litigation, extending the full slate of substantive rights under IDEA to an entirely new class of beneficiaries will inevitably saddle States and their school districts with conditions to which they did not agree under the statute. The statute, after all, was designed to protect "Individuals with Disabilities." Petitioners would inject "parent" in the myriad places where Congress spoke of a *child's* right to a FAPE. Such revisionism alters the entire focus of the statute and reshapes how special education services are provided under IDEA while the child gets lost in the balance.

As written, the statute focuses efforts on how to best meet the "needs of the child." 20 U.S.C. § 1414(d)(3)(A)(iv); *see also id.* at § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.321(b)(2) ("If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered."). Petitioners invite this Court to instead render the States beholden to the "interests" and "needs" of the parents.

It must also be remembered that a consequence of agreeing to accept federal funds through IDEA involves the State waiving its sovereign immunity otherwise guaranteed by the Eleventh Amendment and ceding some control over its educational prerogatives as ensured by the Tenth Amendment. U.S. CONST. amend. X, XI. *See, e.g., Virginia v. Riley,* 106 F.3d 559, 570-71 (4th Cir. 1997) (recognizing that educational choices are "peculiarly within their powers as sovereign States" and that if Congress desires to infringe on that terrain, "it must at least do so affirmatively and unambiguously") (panel dissent of Luttig, J., adopted by en banc court as majority opinion); *M.A. v. State-Operated Sch. Dist. of the City of Newark*, 344 F.3d 335, 347 (3d Cir. 2003) ("Taken together, §§ 1403 and 1415 embody a clear and unambiguous expression of Congress's intent to condition a state's participation in the IDEA on the state's waiver of Eleventh Amendment immunity from suit in federal court."). The States, without clear notice, would have thus forsaken immunity from suits by an entirely new category of plaintiffs and relinquished even greater control over educational policy than they believed.

3. The fact that IDEA funds generally should not be used to pay attorneys' fees or costs does not negate the Spending Clause, as Petitioners suggest, or *Arlington* would have been decided differently. Pet. Br. at 15 n.10, *citing* 34 C.F.R. 300.517(b)(1). Since the issue in *Arlington* was whether certain fees were recoverable as costs, it would have been easily

resolved if the answer were that IDEA simply does not provide funds for such matters. Yet that is not what this Court held; it instead applied the Spending Clause regardless of the argument now advanced by Petitioners.

In fact, the failure of Congress to provide adequate funding only heightens the relevance of the "clear notice" requirement. States must have clear notice of all of their obligations and conditions under Spending Clause legislation so that they can perform their own calculus as to whether to accept the deal. If Congress is not providing funding for certain aspects of a program, it is all the more important that States be fully apprised of the unfunded mandate accompanying the bargain.

4. Congress certainly knew how to provide clear notice to the States that they would be subjected to defending *pro se* actions by parents on substantive grounds – it spelled the notice out in the legislative proposal in 2004 that passed the Senate but was rejected by Congress as a whole: "a parent of a child with a disability may represent the child in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004).[15] This case presents one of the most compelling examples of the absence of clear notice in light of the fact that Congress rejected this specific proposal and knew that the federal courts had disavowed the underlying legal theory as well.

---

[15] Petitioners make a few passing references to the legislative history, Pet. Br. at 19, but uncover nothing as pertinent as the history surrounding the 2004 failed amendment. It must also be remembered that this Court in *Arlington* rejected unequivocal legislative history in the face of statutory language that simply did not incorporate the concepts embodied in the history. *See Arlington*, 126 S. Ct. at 2463 ("Whatever weight this legislative history would merit in another context, it is not sufficient here."); *id.* at 2465 (Ginsburg, J., concurring) ("[W]e are not at liberty to rewrite 'the statutory text adopted by both Houses of Congress and submitted to the President,' to add several words Congress wisely might have included.") (internal citation omitted).

The circuit lineup on this issue is further testament to the fact that no clear notice of these conditions appears in IDEA. Six circuits – the Second, Third, Fourth, Sixth, Seventh, and Eleventh – held that parents could not proceed *pro se* on behalf of their child or that they lacked substantive rights against only one circuit (the First) on the other side. *See Mosely v. Board of Educ. of City of Chicago*, 434 F.3d 527 (7th Cir. 2006); *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005); *Doe v. Board of Educ. of Baltimore County*, 165 F.3d 260, 263 (4th Cir. 1998); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998); *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997); *but see Maroni v. Pemi-Baker Regional Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003). If the language were so clear as to provide requisite notice to "a state official who is engaged in the process of deciding whether the State should accept IDEA funds," *Arlington*, 126 S. Ct. at 2459, one would not have expected so many federal circuit judges to go astray. *See, e.g., Pennhurst*, 451 U.S. at 25 (finding that it "strains credulity" that States would have known of their obligations under a Spending Clause statute when federal agency "never understood" statutory provision "to impose conditions on participating States").

In fact, Judge Roth, dissenting in *Collinsgru*, openly recognized that "the Act is silent with regard to the nature of the role of parents during federal court proceedings under the Act. Thus, *it is not clear* from the language of the Act whether parents are 'aggrieved parties' able to bring a court action on their own behalf, or whether the right to appeal belongs solely to their child or belongs to both parents and child." *Collinsgru*, 161 F.3d at 238 (Roth, J., dissenting) (emphasis added). This recognized silence and lack of clarity cannot provide the "clear notice" required under the Spending Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

PIERRE H. BERGERON
SQUIRE, SANDERS &
DEMPSEY, LLP
312 Walnut Street
Suite 3500
Cincinnati, Ohio 45202
(513) 361-1200

CHRISTINA HENAGEN PEER
Counsel of Record
SQUIRE, SANDERS &
DEMPSEY, LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 479-8500

January 23, 2007

APPENDIX

JEFF AND SANDEE WINKELMAN
1853 Jacqueline Dr.
Parma, OH 44134
440-842-6547
jswinky@yahoo.com

June 2, 2003

SUPERINTENDENT
Dr. Kurt Stanic
Parma City Schools
6726 Ridge Rd.
Parma, Ohio 44129

Office for Exceptional Children
Procedural Safeguards
Ohio Dept. of Education
25 S. Front St., 2nd Floor
Columbus, OH 43215-4104

Dear Dr. Stanic,

We are the parents of Jacob Winkelman, who is in the Autistic Pre-School Program at Achievement Centers East.

I am requesting an impartial due process hearing in order to challenge the Parma City School district, Cuyahoga County, to provide a free, appropriate, public education for my child, Jacob Winkelman, who has a disability.

Parma City Schools do not have a developed Autistic Program that provides the needed intervention and support for my child, Jacob Winkelman. I am in disagreement with the placement currently being offered as a continuum to the current classroom at Achievement Centers. I feel the school is not providing my child with a free, appropriate, public education. My child is not being permitted to be in his least restrictive environment.

The only possible resolution to this matter is to place Jacob in a Specialized Autistic program.

Please provide me with a list of free or low cost legal assistance that I could contact.

Thank you for your attention to my request. I may be reached at 440-842-6547.

Sincerely,

Jeff and Sandee Winkelman

cc: Kevin Kelley, President
Dr. Judith Hudgins, hand delivered
Achievement Centers, hand delivered
Office for Exceptional Children, Procedural Safeguards, Certified Mail

The Individuals with Disabilities in Education Act, 20 U.S.C. 1400 et seq., provides in pertinent part:

§ 1400. Congressional statements and declarations

* * * * *

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

* * * * *

§ 1401. Definitions

* * * * *

(23) Parent

The term "parent" means –

(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);

(B) a guardian (but not the State if the child is a ward of the State);

(C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(D) except as used in sections 1415(b)(2) of this title and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent.

* * * * *

§ 1406. Requirements for prescribing regulations

* * * * *

(b) Protections provided to children

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter that –

* * * * *

(2) procedurally or substantively lessens the protections provided to children with disabilities under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation.

* * * * *

§ 1411. Authorization; allotment; use of funds; authorization of appropriations

(a) Grants to States

(1) Purpose of grants

The Secretary shall make grants to States, outlying areas, and freely associated States, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this subchapter.

* * * * *

(e) State-level activities

* * * * *

(3) Local educational agency risk pool

* * * * *

(E) Legal Fees

The disbursements under subparagraph (D) shall not support legal fees, court costs, or other costs associated with a cause of action brought on behalf of a child with a disability to ensure a free appropriate public education for such child.

(F) Assurance of a free appropriate public education

Nothing in this paragraph shall be construed –

(i) to limit or condition the right of a child with a disability who is assisted under this subchapter to receive a free appropriate public education pursuant to section 1412(a)(1) of this title in the least restrictive environment pursuant to section 1412(a)(5) of this title;

* * * * *

§ 1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children –

* * * * *

(3) Child find

(A) In general -

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

* * * * *

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

* * * * *

(B) Additional requirement

(i) In general

A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.

* * * * *

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

* * * * *

(11) State educational agency responsible for general supervision

* * * * *

(B) Limitation

Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

* * * * *

(12) Obligations related to and methods of ensuring services

(A) Establishing responsibility for services

The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate pubic education to children with disabilities, provided that the financial responsibility of each public agency described in subparagraph (B), including the State medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

* * * * *

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

* * * * *

(D) Parental consent

(i) In general

* * * * *

(II) Consent for services

An agency that is responsible for making a free appropriate public education available to a child with a disability under this subchapter shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.

* * * * *

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –

* * * * *

(II) a statement of measurable annual goals, including academic and functional goals, designed to –

* * * * *

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter –

* * * * *

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

* * * * *

§ 1415. Procedural safeguards

* * * * *

(b) Types of procedures

The procedures required by this section shall include the following:

* * * * *

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) of this section (which shall remain confidential) –

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include –

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of Title 42, available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

* * * * *

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under the subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6) of this section, to resolve such disputes through a mediation process.

* * * * *

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) –

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

* * * * *

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL., PETITIONERS

v.

PARMA CITY SCHOOL DISTRICT,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTHCIRCUIT

REPLY BRIEF FOR THE PETITIONERS

JEAN-CLAUDE ANDRÉ
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

REPLY BRIEF FOR THE PETITIONERS 1

I. PARENTS OF DISABLED CHILDREN HAVE JUDICIALLY ENFORCEABLE RIGHTS OF THEIR OWN UNDER IDEA 2

A. Parents of Disabled Children Have a Substantive Right Under IDEA to a Free Appropriate Public Education for Their Child 2

B. Parents of Disabled Children Have Actionable Procedural Rights Under IDEA 6

II. ALLOWING PARENTS TO REPRESENT THEIR CHILDREN IN COURT IS CONSISTENT WITH CONGRESSIONAL INTENT 11

III. RESPONDENT'S OTHER SOURCES OF LAW DO NOT REQUIRE IDEA CASES TO BE BROUGHT BY AN ATTORNEY 15

A. Congress' Refusal in 2004 to Enact a Parental Lay Representation Provision Does Not Require IDEA Cases To Be Brought By an Attorney 15

B. The Spending Clause, Even If Applicable to This Case, Does Not Require IDEA Cases To Be Brought By an Attorney 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Arlington Cent. Sch. Dist. v. Murphy, 126 S. Ct. 2455 (2006) 18, 19
Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U.S. 104 (1991) 11
Barnes v. Gorman, 536 U.S. 181 (2002) 17, 19
Bell v. New Jersey, 461 U.S. 773 (1983) 19
Board of Educ. v. Rowley, 458 U.S. 176 (1982) 4, 8, 12
Bob Jones University v. United States, 461 U.S. 574 (1983) 15, 16, 17
Buckhannon Bd. & Home Care, Inc. v. West Virginia Dept. of Health & Human Servs., 532 U.S. 598 (2001) 13
Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (CA6 2005) 14
Cedar Rapids Comm. Sch. Dist. v. Garrett F., 526 U.S. 66 (1999) 11
Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) 15, 16
Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59 (CA2 1990) 14
Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 (CA3 1998) 13
Emery v. Roanoke City Sch. Bd., 432 F.3d 294 (CA4 2005) 6
In re Chapman, 166 U.S. 661 (1897) 8
Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) 19
Leh v. General Petroleum Corp., 382 U.S. 52 (1965) 8
Malone v. Nielson, --- F.3d ---, 2007 WL 136127 (CA7 Jan. 22, 2007) 6
Marks v. United States, 430 U.S. 188 (1977) 15
Maroni v. Pemi-Baker Regional School District, 346 F.3d 247 (CA1 2003) 13, 17

TABLE OF AUTHORITIES

Page

Rapanos v. United States, 126 S. Ct. 2208 (2006) 15, 16
Schaffer v. Weast, 126 S. Ct. 528 (2005) 6
School Comm. of Burlington v. Department of Educ., 471 U.S. 359 (1985) 6
University of Tennessee v. Elliott, 478 U.S. 788 (1986) 11
Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123 (CA2 1998) (per curiam), cert. denied, 526 U.S. 1025 (1999) 14

STATUTES AND RULE

Individuals with Disabilities in Education Act, 20 U.S.C. 1400 *et seq.* 1
20 U.S.C. 1400(c)(1) 3
20 U.S.C. 1400(c)(3) 3
20 U.S.C. 1400(d)(1)(A) 3, 13
20 U.S.C. 1400(d)(1)(B) 3
20 U.S.C. 1401(9) 3, 4, 5
20 U.S.C. 1401(29) 3, 4
20 U.S.C. 1412(a)(10)(B)(i) 3
20 U.S.C. 1412(a)(10)(C)(ii) 1, 5, 6
20 U.S.C. 1415(b)(6) 8, 9
20 U.S.C. 1415(b)(6)(B) 7
20 U.S.C. 1415(b)(8) 7
20 U.S.C. 1415(c)(2)(B) 7
20 U.S.C. 1415(d)(2) 7
20 U.S.C. 1415(e)(2)(A)(ii) 7
20 U.S.C. 1145(f)(1) 7
20 U.S.C. 1415(f)(1)(B)(i) 7
20 U.S.C. 1415(f)(3)(E) 10
20 U.S.C. 1415(f)(3)(E)(ii) 9
20 U.S.C. 1415(f)(3)(E)(ii)(II) 1
20 U.S.C. 1415(g) 6

TABLE OF AUTHORITIES

Page

20 U.S.C. 1415(i)(2)(A) 1, 6
20 U.S.C. 1415(i)(3)(B) 18
20 U.S.C. 1415(i)(3)(B)(i)(I) 10
20 U.S.C. 1415(i)(3)(B)(i)(II) 10
20 U.S.C. 1415(i)(3)(B)(i)(III) 10
20 U.S.C. 1415(i)(3)(E) 10
20 U.S.C. 1415(k)(3)(A) 7
20 U.S.C. 1471 13
28 U.S.C. 1654 ..... 1, 18
Ohio Admin. Code § 3301-51-08(C)(1)(a) 5
Ohio Admin. Code § 3301-51-08(C)(1)(b) 5
Fed. R. Civ. P. 17(c) 14

MISCELLANEOUS

150 Cong. Rec. S5430 (daily ed. May 13, 2004) 16
H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. (2004) 16
S. Rep. No. 108-185, 108th Cong., 1st Sess. (2003) 16
Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1997 Ann. Surv. Am. L. 117 19

REPLY BRIEF FOR THE PETITIONERS

Through the Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. 1400 *et seq.*,[1] Congress conferred to disabled children *and their parents* the substantive statutory right to a free appropriate education (FAPE) and various procedural rights and remedies designed to ensure that educational agencies provide a FAPE. Petitioners' complaint asserts claims for violations of both substantive and procedural rights that Congress expressly granted to and, therefore, made enforceable by parents in their own right.

Among other things, petitioners' complaint asserts both a substantive claim for reimbursement of the private school tuition that Jacob's parents paid after respondent failed to provide Jacob with a FAPE (JA 19) and a claim that respondent violated the parents' procedural rights when respondent predetermined Jacob's educational placement "without [their] meaningful input" (JA 17).[2] As real parties in interest to and having exhausted such claims before the State educational agency, Jacob's parents are "part[ies] aggrieved" under IDEA's express right-to-sue provision, § 1415(i)(2)(A), and may bring those claims *pro se* under 28 U.S.C. 1654.

Perhaps cognizant that they are on their weakest footing when they argue that Jacob's parents may not seek to vindicate their claims as their own, respondent attempts to obfuscate the statutory construction inquiry whether parents suing under IDEA are suing in their own right by fo-

---

[1] All statutory references are to IDEA's codifications in Title 20 of the United States Code unless otherwise noted.

[2] See § 1412(a)(10)(C)(ii) (providing that "a court or a hearing officer may require the agency to reimburse *the parents*" for private school tuition (emphasis added)); § 1415(f)(3)(E)(ii)(II) (providing that a complaining parent will be entitled to relief if, *inter alia*, "procedural inadequacies * * * significantly impeded the *parents' opportunity* to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child" (emphasis added)).

cusing first (and its *amici* by focusing primarily) on the alternative (and possibly unnecessary) inquiry whether non-lawyer parents without rights of their own may bring IDEA cases as lay advocates on behalf of their children. Respondent's attempt to lure the Court away from the primary (and necessary) inquiry cannot obscure the fact that respondent's arguments as to both inquiries lack merit.

I. PARENTS OF DISABLED CHILDREN HAVE JUDICIALLY ENFORCEABLE RIGHTS OF THEIR OWN UNDER IDEA

IDEA confers on parents of disabled children both procedural rights and the substantive right to ensure that local school districts provide their children with a FAPE. Pet. Br. 30-35; US Br. 14-18. Contrary to the holding of the court of appeals below and the arguments offered by respondent and its *amici*, these rights are not merely derivative of or collateral to the disabled child's right to a FAPE, as the overwhelming evidence gathered by petitioners, the United States, and other *amici* demonstrates. See Pet. Br. 30-36; see also *id.* at 3 (noting 212 express references in the statute to "parent" or "parent" and 17 references to "family" or "families"); US Br. 14-22; Senator Edward M. Kennedy *et al.* (Cong.) Br. 9-27; Council of Parent Attorneys & Advocates *et al.* (COPAA) Br. 14-21.; Ohio Coalition for the Educ. of Children with Disabilities *et al.* (Ohio Coalition) Br. 4-22.

A. Parents of Disabled Children Have a Substantive Right Under IDEA to a Free Appropriate Public Education for Their Child

The Court need not "rewrite the statute to mandate that a FAPE be made available to 'children with disabilities *and their parents*,'" as respondent mistakenly argues (at 21 (emphasis in original)), because Congress already so provided. Consistent with Congress' goal[3] to "ensure that the

[3] Respondent and its *amici*'s claim that the *sole* purpose of the statute was to "provide disabled children with a [FAPE]," cannot be squared

rights of children with disabilities *and parents of such children* are protected" (§ 1400(d)(1)(B) (emphasis added)), IDEA guarantees "children with disabilities *and the families of such children* access to a free appropriate education [(FAPE)]" (§ 1400(c)(3) (emphasis added)).[4]

That Congress gave parents their own substantive right to ensure that educational agencies provide a FAPE to their children is most clearly manifested in Congress' definition of FAPE itself. Congress defined FAPE as "special education and related services" (§ 1401(9)) that are, among other things, "appropriate" and provided "*at no cost to parents*," § 1401(29) (emphasis added); see also § 1412(a)(10)(B)(i) (requiring, under certain circumstances, that children with disabilities placed in private schools by public agencies be "provided special education and related services, in accordance with an individualized education program [IEP], *at no cost to their parents*." (emphasis added)). Congress noticeably did not define FAPE as "special education and related services *at no cost to the disabled child*," as it easily could have if it intended disabled children to be the only real parties in

---

with Congress' declaration of *four* purposes, including the purposes "to ensure that the rights of children with disabilities and *parents of such children* are protected" and "to ensure that educators and *parents* have the necessary tools to improve educational results for children with disabilities." Compare § 1400(d)(1)(B) & (3) with Resp. Br. 21 (discussing § 1400(d)(1)(A)) and National School Board Assn. *et al.* (NSBA) Br. 3 (discussing § 1400(d)(1)(A)).

[4] Respondent criticizes (at 35) petitioners' reliance on § 1400(c)(3)'s "hortatory" use of the word "families" because it appears in IDEA's preamble, yet respondent and its *amici* rely on other statements in IDEA's preamble. Resp. Br. 7 & 21 (invoking § 1400(d)(1)(A), 20 (invoking § 1400(c)(1)); NSBA Br. 3, 14 (invoking § 1400(d)(1)(A)). In any event, petitioners rely on the preamble as simply one piece of confirming evidence that IDEA confers rights on parents themselves that are not merely derivative of the rights guaranteed for their children.

interest to the substantive statutory right to a FAPE.[5] Perhaps this is why respondent and its *amici* never attempt to address Congress' definition; neither § 1401(9) nor § 1401(29) are discussed – much less, cited – in any of the three bottom-side briefs.

Instead, respondent and its *amici* chide petitioners for "not elaborat[ing] on how a parent's substantive right to a FAPE could be applied" and suggest that "[p]etitioner's reading would confound school districts and the judiciary alike, as they would struggle to determine how to apply to parents a statute designed to enhance the educational opportunities of children." Resp. Br. 32; see also NSBA Br. 17. This criticism is a straw-man. Nothing in IDEA suggests – and petitioners do not contend – that the identity of the party alleging the denial of a FAPE requires reviewing hearing officers or courts to apply differing standards. All a hearing officer or court reviewing a claim that the substantive statutory right to a FAPE was denied need determine is whether the educational agency complied with the statute's – not a particular individual's – requirements. Cf. *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) ("[N]othing in the Act * * * suggest[s] that * * * [Congress]

---

[5] Of course, a parent's interest in the substantive statutory right to a FAPE is not purely pecuniary. As members of the child's IEP Team and contributing architects to the design of the child's IEP, parents also have a vested interest in the *appropriateness* of the special education and related services provided to their child. See Pet. Br. 3-4; Cong. Br. 22-27.

Perhaps to suggest that this is not the case with Jacob's parents, respondent and its *amici* assert that Jacob's parents "elected to keep Jacob out of school entirely in the 2004-05 and the current school year in favor of pursuing claims for tuition reimbursement." CGCS Br. 24 n.13 (emphasis added); see also Resp. Br. 6; NSBA Br. 22. Not only is this assertion irrelevant to the question presented, it is untrue. In 2004-05, Jacob was enrolled at the Monarch School, see Pet. Mot. Inj. Pending Appeal Ex. C, No. 04-4159 (filed Jan. 3, 2005) (Dec. 13, 2004, Ltr. From Debra Mandell, Director, Monarch Sch.) ("Jacob is enrolled at Monarch school."), where is presently enrolled today.

intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself.").

In any event, a parent's own right to enforce the substantive statutory right to a FAPE could not be clearer than in this case, in which Jacob's parents placed him at a private school and incurred out-of-pocket tuition expenses themselves. Consistent with its guarantee that disabled children receive appropriate "special education and related services" "at no cost to parents," §§ 1401(9) & (29), Congress gave parents an express right to ask "a court or a hearing officer [to] require the agency to reimburse *the parents*" for private school tuition. § 1412(a)(10)(C)(ii) (emphasis added).[6]

Respondent counters (at 31) that the child, nonetheless, "remains the real party in interest to any such [reimbursement] action as any reimbursement is premised on his injury." But that rejoinder ignores that, in most cases (and in this case), "the parents of the disabled child will be the appropriate ones to seek reimbursement because they will have incurred the expense and suffered the subsequent monetary injury." *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299 (CA4 2005); cf. *School Comm. of Burlington v.*

---

[6] Jacob's parents have consistently sought reimbursement throughout this dispute. Respondent repeatedly references (at 20, 24, 38 & n.13) petitioners' due process complaint (Resp. Br. App. 1a-2a) to suggest that the only claim properly before this Court is *Jacob's* claim to a FAPE. Not so. Under Ohio law, Jacob's parents were required to provide in their due process complaint only "a description of the nature of the problem." Ohio Admin. Code § 3301-51-08(C)(1)(a). It is the due process hearing officer's duty upon receiving such a complaint to "seek additional information and clarify the issues." *Id.* § 3301-51-08(C)(1)(b). The hearing officer in this case did so and clarified that "the relief requested in association with this administrative hearing involves * * * reimbursement for tuition" (JA 88). She subsequently determined that "the petitioners" – Jacob's parents (JA 21) – "are not entitled to reimbursement" (JA 78).

Department of Educ., 471 U.S. 359, 373-74 (1985) (explaining that parents who change their child's placement pending IDEA disputes "do so at their own financial risk"). Indeed, as both courts of appeals to have considered the issue agree, only individuals who actually incur expenses for special education and related services have standing to pursue a reimbursement claim under § 1412(a)(10)(C)(ii). See *Malone v. Nielson*, --- F.3d ---, 2007 WL 136127, *3 (CA7 Jan. 22, 2007); *Emery*, 432 F.3d at 299. A holding by this Court that Jacob's parents may not bring that claim in their own right would effectively write § 1412(a)(10)(C)(ii) out of the statute because neither Jacob nor anyone else would have standing to assert it.

B. Parents of Disabled Children Have Actionable Procedural Rights Under IDEA

In addition to making parents of disabled children real parties in interest to IDEA's substantive statutory right to a FAPE, Congress gave parents various procedural rights and remedies to help them vindicate the substantive right. See *Schaffer v. Weast*, 126 S. Ct. 528, 532 (2005) (noting several examples). Respondent argues (at 37) that "Congress did not permit" these procedural rights "to be independently enforceable in court." Because "IDEA civil actions are * * * limited to adjudicating matters 'with respect to the [due process] complaint'" (at 23) and "[p]arents are never the real party in interest" to that complaint (at 37 n.12; see also *id.* at 31), respondent argues, parents cannot be "part[ies] aggrieved" by a due process hearing officer's rejection of parents' procedural claims. The statute's text does not support respondent's argument.

While it is certainly true that the "due process complaint * * * frame[s] the universe of claims eligible for any further administrative review under § 1415(g) or judicial review under § 1415(i)(2)(A)," Pet. Br. 35, respondent is mistaken that parents are not real parties in interest to due process complaints and that parents' procedural claims are

not actionable at the administrative level. IDEA's text unambiguously indicates that Congress considered an administrative complaint filed by parents under IDEA to be the parents' *own* complaint and not simply a complaint that they bring on behalf of their child. Among other similar provisions confirming that the right to due process belongs to parents (Pet. Br. 18-19; Cong. Br. 10-11), IDEA mandates that, before a due process hearing takes place, educational agencies convene a meeting "where the *parents* of the child discuss *their complaint*." § 1415(f)(1)(B)(i) (emphasis added). Had Congress intended a parent's due process complaint to be brought only "on behalf of the child," as respondent and its *amici* argue (Resp. Br. 25, 37 n.12; CGCS Br. 6; NSBA Br. 5-7, 14), Congress could have easily referred to the due process complaint as "the child's," "the child's brought by his or her parents," or "the parent's on behalf of the child." But Congress decidedly did not refer to the due process complaint in these terms in any of IDEA's many pertinent provisions.[7]

---

[7] See § 1415(b)(6)(B) (providing a statute of limitations for due process complaints of "not more than 2 years before the date the *parent* or public agency knew or should have known about the alleged action that forms the basis of the complaint."); § 1415(b)(8) ("require[ing] the State educational agency to develop a model form to assist *parents* in filing a complaint and due process complaint notice."); § 1415(c)(2)(B) (requiring school districts, upon receiving a "*parent's* due process complaint notice," to respond to it within ten days); § 1415(d)(2) (requiring that, "upon * * * the filing of a complaint," educational agencies provide "a full explanation of the procedural safeguards, written in the native language of the *parents*."); § 1415(e)(2)(A)(ii) (ensuring that IDEA's mediation process "is not used to deny or delay a *parent's right* to a due process hearing"); § 1415(f)(1) (requiring that once the complaint is filed, "the *parents* or the local education agency involved shall have an opportunity for an impartial due process hearing"); § 1415(k)(3)(A) ("The *parent* of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is

Nor did Congress limit the scope of a due process complaint (and, by extension, the bundle of claims that start at due process and may end up in court)[8] to only children's claims. Section 1415(b)(6) allows parents to bring their due process complaints "with respect to *any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." (Emphasis added). In support of their erroneous theory that due process complaints are brought by parents on behalf of their children, respondent and its *amici* focus exclusively on § 1415(b)(6)'s references to "the child" and "such child" and blow right past Congress' use of the broad phrase "any matter." Resp. Br. 23; NSBA Br. 8-9. This is not surprising, given that Congress' inclusion of the words "any matter" indicates its intent to make the universe of claims actionable at due process (and in court) broader than it would otherwise be had "any matter" not appeared in § 1415(b)(6). See, *e.g., In re Chapman*, 166 U.S. 661, 667 (1897) (rejecting suggestion that Congress' reference to "'any' matter" is "fatally defective, because too broad and unlimited"); cf. *Leh v. General Petroleum Corp.*, 382 U.S. 52, 59 (1965) ("[E]ffect must be given to the broad terms of the statute itself – 'based in whole or in part on any matter complained of.'").

Moreover, because "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process * * * as it did upon the measurement of the resulting [special education] against a substantive standard," *Rowley*, 458 U.S. at 205-06, the only

---

substantially likely to result in injury to the child or to others, may request a hearing."). (Emphases added).

[8] As explained in petitioners' opening brief and by their *amici*, nothing in IDEA's administrative appeal or judicial review provisions narrows the bundle of actionable claims (Pet. Br. 35-36; Cong. Br. 11-14, 18; COPAA Br. 16-17), and respondent does not contend otherwise.

reasonable construction of § 1415(b)(6)'s use of the phrase "any matter" is that it includes both the substantive claim that a FAPE has been denied *and* parents' procedural claims – that is, the full panoply of claims. See Pet. Br. 35-36; Cong. Br. 17-18.

Respondent posits that "Congress could have clarified that *parents* could seek certain relief under [§ 1415(b)(6)] for harm to themselves, but it declined to do so." Resp. Br. 31 (emphasis in original). Respondent, however, ignores § 1415(f)(3)(E)(ii), which expressly provides that certain "procedural inadequacies" that "significantly impede[] the *parents'* opportunity to participate in the decisionmaking process regarding the provision of a [FAPE]" are themselves actionable denials of a FAPE themselves.[9] (Emphasis added). This case presents just such a procedural inadequacy, insofar as Jacob's parents alleged in their complaint that respondent predetermined Jacob's placement "and tailor[ed] the IEP to suite [sic] that placement * * * without [their] meaningful input."[10] JA 17. Respondent and its

---

[9] Section 1415(f)(3)(E)(ii) provides that "[i]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a [FAPE] only if the procedural inadequacies – (I) impeded the child's right to a [FAPE]; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a [FAPE] to the parents' child; or (III) caused a deprivation of educational benefits."

The NSBA misconstrues the statute when it argues (at 8) that § 1415(f)(3)(E)(ii)'s reference to "the parents' opportunity to participate in the decisionmaking process" is not a separate cause of action but instead "evidence that can be submitted in support of an argument that the child did not receive a FAPE." This attempt to cast parents' procedural claims as derivative of their children's substantive claim is not faithful to the text as it would render clause (II) superfluous to clauses (I) and (III). The text is clear that "significant[]" infringement of "the parents' opportunity to participate in the decisionmaking process" is itself a denial of a FAPE.

[10] Like their substantive claim for reimbursement, the parents' procedural claim that respondent predetermined Jacob's placement without

amici's overly narrow reading of the scope of administrative review would render such a procedural inadequacy entirely unredressable, and contravene Congress' express recognition in § 1415(f)(3)(E) that hearing officers and courts are empowered to remedy certain violations of parents' procedural rights.

* * * * *

Lest there be any doubt that parents have their own judicially enforceable rights, Congress clarified as much in 2004, when it specifically identified, through the attorneys' fees provisions of IDEA, that "parents" may qualify as the "prevailing party" to an IDEA dispute regardless whether the dispute is resolved at the administrative level or in court and regardless whether the claims on which the parents prevail are substantive or procedural. See § 1415(i)(3)(B)(i)(I) & (E); see also Pet. Br. 25-28; US Br. 18-22; Cong. Br. 16.

Respondent does not attempt to meaningfully address IDEA's attorneys' fees provisions. Instead, it simply asserts conclusorily (at 29) that "the congressional choice to permit attorneys' fees cannot be twisted into a basis for guaranteeing parents the right to proceed *without counsel*." (Empha-

---

their meaningful input was plainly before the hearing officer and not, as respondent mistakenly asserts (at 38 n.13), raised for the first time in district court. See, *e.g.*, JA 23-24 ("[T]he school district must provide notice of a change of placement. * * * The parents in this case believe this is an unauthorized change of placement of which they do not approve."). Nor is respondent correct (at 38 n.13) that petitioners' other procedural claims are untimely because they were not presented in their due process complaint. Those claims, which challenge the procedures employed during the due process hearing itself, could not possibly have been raised until the next level of review, where petitioners did raise them. See, *e.g.*, JA 121 ("[T]he issues as raised by the parents' brief are that procedurally, IHO Freda acted improperly when she employed an assistant who attended the due process hearings and when she allowed for excessive time delays that cause harm to the parents.").

sis in original). This attempt to brush aside the attorneys' fees provisions cannot be squared with the Court's commitment to look to IDEA's "overall statutory scheme" when interpreting the statute, *Cedar Rapids Comm. Sch. Dist. v. Garrett F.*, 526 U.S. 66, 73 (1999) – particularly, when, as here, the attorneys' fees provisions so clearly confirm the meaning of other provisions in dispute.

II. ALLOWING PARENTS TO REPRESENT THEIR CHILDREN IN COURT IS CONSISTENT WITH CONGRESSIONAL INTENT

As demonstrated in petitioners' opening brief (at 37-43), even if parents do not possess their own judicially enforceable rights under IDEA, parents should be able to assert their children's rights *pro se*. In the absence of parents' ability to assert their own rights under the statute, permitting parental lay representation is the only result "consistent with Congress' intent in enacting" IDEA. *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 110 (1991) (quoting *University of Tennessee v. Elliott*, 478 U.S. 788, 796 (1986)).

Respondent (at 13) and its *amici* (CGCS Br. 29) urge this Court to apply a higher "clear statement" standard to the inquiry whether to abrogate the common law presumption against lay representation. But the Court has reserved the "[r]ules of plain statement and strict construction" for only "the protection of weighty and constant values * * * [i]n traditionally sensitive areas," such as Eleventh Amendment sovereign immunity or the extraterritorial application of domestic statutes. *Astoria*, 501 U.S. at 108-09. Less sensitive areas presenting less weighty values – even if "long favored" – require only that the Court determine whether abrogation of the relevant common law principle is "consistent with Congress' intent in enacting the statute." *Id.* at 107, 109-10 (holding that administrative preclusion, although "long favored," does not "represent independent values of such magnitude and constancy as to justify the protection of a clear-statement rule").

In light of the dearth of available counsel to litigate IDEA disputes in court,[11] see Pet. Br. 41-42; Autism Soc'y of Am. (ASA) *et al.* Br. 9-10; COPAA Br. 9-10, application of the common law presumption against lay representation in IDEA cases will have the unacceptable consequence of destroying IDEA's express right of judicial review and making administrative review final for countless disabled children and their families – a consequence that Congress clearly did not intend.[12] See *Rowley*, 458 U.S. at 205 ("Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts."); see also COPAA Br. 21. Along the way, Congress' goal of preparing disabled chil-

---

[11] The NSBA asserts (at 27-28) that the 41 attorneys located in 9 states by petitioners' *amici* (ASA Br. 8-10) "is actually a reasonable number of attorneys to take on" the 301 IDEA civil suits filed each year. This is wishful thinking, as both this case and the large number of other cases in which the question presented has arisen demonstrate. See US Cert. Br. 8 n.5 (collecting cases in which question presented has arisen). Indeed, the Court need only take note who represents petitioners here (and represented petitioners in their related Sixth Circuit appeal) – a California-based attorney – and who represents petitioners in their presently pending due process proceedings – an Ohio-based *criminal defense* attorney, http://www.michaeljgoldberg.net/. Neither the Ohio Legal Rights Service (OLRS – the designated Protection & Advocacy organization for the State of Ohio), the Equal Justice Foundation (EJF), nor the Ohio Legal Assistance Foundation – each of which attempt to provide some *pro bono* representation to disabled children and their families, see EJF Br. 1-2 – have ever represented – much less, had sufficient resources to offer to represent – petitioners, see ASA Br. 7 (noting that OLRS received 595 requests for assistance in 2006 and provided assistance in less than three percent of those cases because it employs only four attorneys and lay two advocates who handle IDEA cases and none of whom work on IDEA cases full-time).

[12] Respondent's *amici* (CGCS Br. 18) suggest that "most [of] the claims that are likely to be cut off by a bar on *pro se* actions by parents under the IDEA [will be] frivolous actions." But they do not explain how a court may determine whether an action is frivolous if it is barred from its inception or how a court may protect a disabled child's rights if the action is promptly dismissed or never brought in the first place because the child's parents cannot afford or locate an attorney.

dren for "further education, employment, and independent living" will be thwarted, § 1400(d)(1)(A), because the longer appropriate services are delayed, the more difficult it becomes to counter the disabilities. See *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 240 (CA3 1998) (Roth, J., dissenting) ("[M]any of the benefits of an appropriate education will be lost if they are not timely pursued.").

Respondent (at 17-19) and its *amici* (CGCS Br. 7-9; NSBA Br. 6-7) assert that IDEA and the Federal Rules of Civil Procedure adequately protect disabled children against these ills, but this is not so.[13] Respondent relies first (at 17) on the attorneys' fees provisions of IDEA, which it claims, "ensure a threshold level of protection." But, as the First Circuit has aptly observed, the prospect of attorneys' fees are "a partial incentive at best, as they are awarded only to prevailing parties." *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 258 (CA1 2003). Further, as *amici* have demonstrated, the lower courts' application of *Buckhannon Board & Home Care, Inc. v. West Virginia Department of Health & Human Services*, 532 U.S. 598 (2001), which precludes an award of attorneys fees following a pre-merits adjudication settlement, to IDEA cases "provides little incentive for attorneys to assist with these cases." ASA Br. 11. Additionally, Congress' enactment of a provision that allows school districts to recover fees from a parent's attorney in certain situations provides a strong *disincentive* for attorneys to represent families pursuing IDEA claims. ASA Br. 12 (discussing § 1415(i)(3)(B)(i)(II) & (III)).

---

[13] Respondent's reliance (at 17) on § 1471, which permits grants to "parent organizations" to "provide guidance to parents involved in disputes under IDEA," actually supports petitioners' position that Jacob's parents should be able to litigate this case *pro se*. It would have been strange for Congress to provide such guidance expressly to parents if they were then precluded from utilizing it at the final level of review.

Federal Rule of Civil Procedure 17(c), on which respondent (at 18-19) and its *amici* (CGCS Br. 19; NSBA Br. 6-7) rely heavily, has not appropriately protected disabled children either. Although respondent and its *amici* are quick to point out that the Rule *allows* a "court [to] appoint a guardian ad litem for an infant * * * not otherwise represented in an action or [to] make such other order as it deems proper for the protection of the infant," they can cite only Second Circuit cases actually invoking the Rule's protections. See Resp. Br. 18 (citing *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (CA2 1998) (per curiam), cert. denied, 526 U.S. 1025 (1999); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 59 (CA2 1990)).

If courts actually applied Rule 17(c) in the manner that respondent and its *amici* suggest, this case would not be before this Court.[14] Although the court of appeals held that Jacob was the only real party in interest to this case, Pet. App. 2a ("[T]his appeal is dismissed unless * * * an appearance of counsel is entered in this appeal to represent Jacob."); *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 757 (CA6 2005) ("[A]ny right on which the [parents] could proceed on their own behalf would be derivative of their [child's] right to receive a FAPE, and wholly dependent on the [parents] proceeding, through counsel, with their appeal on [their child's] behalf."), the court never suggested that it would consider appointing counsel to represent Jacob's interests.[15] This has been the approach in the over-

---

[14] Nor would the question presented have recurred with such remarkable frequency (see US Cert. Br. 8 n.5) if courts regularly appointed guardians ad litem or *pro bono* counsel instead of ordering dismissal of *pro se* IDEA suits.

[15] Should the Court agree with respondent and its *amici* that Jacob's parents may not maintain this suit in their own right or as Jacob's lay representatives, the Court should at minimum vacate the court of appeals' dismissal order in this case and direct it to appoint counsel.

whelming majority of cases in which non-lawyer parents file IDEA suits *pro se*.

III. RESPONDENT'S OTHER SOURCES OF LAW DO NOT REQUIRE IDEA CASES TO BE BROUGHT BY AN ATTORNEY

A. Congress' Refusal in 2004 to Enact a Parental Lay Representation Provision Does Not Require IDEA Cases To Be Brought By an Attorney

Respondent (at 16-17) and its *amici* (CGCS Br. 6-9) place considerable weight on Congress' 2004 proposal of and refusal to enact a provision that would have expressly allowed non-lawyer parents to represent their children in IDEA disputes in court. But as petitioners, the United States, and the Congressional *amici* have all already explained (Pet. Br. 43-45; U.S. Br. 23-24; Cong. Br. 27-28), such "Congressional inaction lacks persuasive significance." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (citation omitted).

Notwithstanding the frequency with which the Court has repeated that admonition (see Pet. Br. 44 (collecting cases)), respondent and its *amici* argue that this case is different because the failed amendment spoke to the "precise issue" before the Court. In doing so, they rely on *Rapanos v. United States*, 126 S. Ct. 2208, 2231 (2006), and *Bob Jones University v. United States*, 461 U.S. 574, 600-01 (1983). Neither case, however, will bear the interpretive weight that respondent and its *amici* attempt to place on them.

The portion of *Rapanos* on which respondent and its *amici* rely represented the view of only four Members of the Court and is not controlling under *Marks v. United States*, 430 U.S. 188, 193 (1977). Moreover, the *Rapanos* plurality's observation that the Court "has sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the 'precise issue' presented before the Court," 126 S. Ct. at 2231, was made in the context of *refusing* to place significance on Congress' asserted

acquiescence. To this end, the *Rapanos* plurality stressed "in no uncertain terms, our oft-expressed skepticism towards reading the tea leaves of congressional inaction." *Ibid.*

Respondent and its *amici* fare no better under *Bob Jones*, the prior case to which the *Rapanos* plurality referred. In that case, the Court relied on congressional inaction, but only because it did "not have an ordinary claim of legislative acquiescence" before it. 461 U.S. at 600. "Only one month after the IRS announced" the policy at issue in that case, Congress held "hearings on th[e] precise issue." *Ibid.* By the time the issue reached this Court, "[e]xhaustive hearings ha[d] been held on the issue at various times," and "no fewer than 13 bills [were] introduced to overturn" the policy, but none was enacted. *Ibid.*

Congress' consideration in 2004 of the proposed parental representation provision does not at all resemble the congressional acquiescence at issue in *Bob Jones*. Without any hearings on the issue, the parental representation provision was proposed just once by the Senate as part of IDEA's 2004 reauthorization bill, see 150 Cong. Rec. S5430 (daily ed. May 13, 2004), and dropped by the Conference Committee without explanation, see H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. 220 (2004). Contrary to respondent's assertion (at 16), this sparse legislative history does nothing to undermine the fact that "several equally tenable inferences may be drawn from such inaction, *including the inference that the existing legislation already incorporated the offered change*." *Central Bank of Denver*, 511 U.S. at 187 (emphasis added). Indeed, that IDEA "already incorporated the offered change" was the precise view of the Senate Health, Education, Labor, and Pensions Committee that originally proposed the amendment as a *clarification* of an existing right – not the creation of a new right – to parental lay representation. S. Rep. No. 108-185, 108th Cong., 1st Sess. 41-42 (2003) (declaring that the amendment was designed to

"clarify" and "make clear" "that parents have a right to represent their child in court, without a lawyer for purposes of IDEA law, regardless of whether their claims involve procedural or substantive issues," even though, in its view, the "current statutory language and * * * the rich legislative history emphasizing the importance of parental involvement" already established the right).

An equally plausible explanation for Congress' inaction is that parental lay representation was not necessary at all because (as discussed *supra* at 2-11) parents were already real parties in interest to and could, therefore, sue *pro se* in federal court to enforce the IDEA's panoply of substantive and procedural claims in their own right. Both the timing of the First Circuit's decision in *Maroni*, 346 F.3d at 251, the first case to embrace this reasoning, and Congress' clarification in the attorneys' fees provisions of IDEA that "parents" are "part[ies]" to IDEA court actions are consistent with this explanation. As respondent's *amici* explain (CGCS Br. 8 n.5), *Maroni* was decided shortly after the parental representation provision was added to the Senate's bill. Perhaps believing that *Maroni* appropriately captured Congress' view of the statute's operation and that subsequent courts would follow suit, Congress simply decided to bolster *Maroni* by amending the attorneys' fees provisions, rather than taking the additional and unnecessary step of clarifying that parents may represent their children as lay advocates.

Of course, the Court's inability to know why Congress rejected the proposed parental representation provision is precisely why the Court has steadfastly refused to rely on congressional inaction, except in the extraordinary case like *Bob Jones*.

B. The Spending Clause, Even If Applicable to This Case, Does Not Require IDEA Cases To Be Brought By an Attorney

Notwithstanding the Court's refusal in *Barnes v. Gorman*, 536 U.S. 181, 188 n.2 (2002), to apply the Spending

Clause's "contract-law principles * * * to all issues that [suits under Spending Clause legislation] raise," respondent and its *amici* argue (Resp. Br. 40-49; CGCS Br. 25-29) that the Spending Clause controls the analysis of this case.

Under either approach that petitioners offer to the question presented in this case, however, the Spending Clause is inapplicable. An individual's right to bring their own suit *pro se* is conferred by 28 U.S.C. 1654, which is not Spending Clause legislation. See Pet. Br. 15 n.10; US Br. 11 n.4. Likewise, any exception to the common law presumption against lay representation would be a common law rule itself and not controlled by IDEA or any other Spending Clause legislation.

Nothing in the Court's recent decision in *Arlington Central School District v. Murphy*, 126 S. Ct. 2455 (2006), compels this case to be analyzed through the Spending Clause, which – even if applicable – would be satisfied. In *Murphy*, the Court held that the statutory language of the attorneys' fee provision of IDEA, § 1415(i)(3)(B), did not provide sufficiently clear notice to state officials "engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds," that states could be liable not only for attorneys' fees, but expert witness fees as well. 126 S. Ct. at 2459. Thus, the key question in *Murphy*, as framed by the Court itself, was "whether the IDEA furnishes clear notice regarding the liability at issue." *Ibid.* (emphasis added).

The question in this case, whether resolved by determining that parents of disabled children are real parties in interest to IDEA suits or by determining that parents of disabled children may represent their children's interests as lay advocates in court, does not affect liability at all. The liability of educational agencies for violations of the statute is the same regardless who brings the suit. To be sure, respondent and other educational agencies may face fewer IDEA suits if both inquiries are resolved against petitioners.

But if that were the test for application of the Spending Clause, the Spending Clause would apply to every issue involving a Spending Clause statute – not just liability issues – and decades of this Court's Spending Clause jurisprudence would have to be overruled (which respondent does not ask the Court to do).[16] See, *e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) (holding that the Spending Clause does not require Congress "specifically" to "identify" and "proscribe *each* condition in [Spending Clause] legislation"); *Barnes*, 536 U.S. at 188 n.2 (refusing to apply the Spending Clause's "contract-law principles * * * to all issues that [suits under Spending Clause legislation] raise"); *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983) (holding that the Spending Clause does not necessarily require "the remedies against a noncomplying State" to be set forth unambiguously).

Perhaps this is why respondent (at 44-45) and its *amici* (CGCS 10, 16-17, 19-21) go to such great lengths to manufacture evidence that *pro se* parents are likely to increase school districts' litigation costs. That evidence, however, is entirely speculative[17] and stands in stark contrast to the con-

---

[16] See *Murphy*, 126 S. Ct. at 2471 (Breyer, J., dissenting) ("[T]o view each statutory detail of a highly complex federal/state program * * * simply through the lens of linguistic clarity, rather than to assess its meanings in terms of basic legislative purpose, is to risk a set of judicial interpretations that can prevent the program, overall, from achieving its basic objectives or that might well reduce a program in its details to incoherence.").

[17] This is particularly so when one considers that the evidence is divined overwhelmingly from cases filed by *pro se* prisoners, whose propensity to file suit, level of education, and familiarity with the law are different from other *pro se* litigants. See, *e.g.*, *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Ann. Surv. Am. L. 117, 302 (reporting that "the vast majority of the civil *pro se* docket" is composed of prisoner cases).

crete increase in liability that educational agencies would have faced had *Murphy* been decided the other way.

In any event, for the reasons explained throughout petitioner's opening brief, this reply brief, and the various top-side *amici* briefs, the statute is sufficiently clear that parents may sue *pro se* under IDEA to satisfy whatever lens through which the Court views the question presented.

CONCLUSION

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JEAN-CLAUDE ANDRÉ
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

FEBRUARY 2007

(16)

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN *et al.*, *Petitioners,*

v.

PARMA CITY SCHOOL DISTRICT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JEAN-CLAUDE ANDRE
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Avenue
Los Angeles, CA 90034
Tel./Fax: (310) 558-0932

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8,[1] Petitioners Jacob Winkelman, by and through his parents, Jeff and Sandee Winkelman; Jeff Winkelman; and Sandee Winkelman submit this supplemental brief in support of their February 2, 2006, petition for a writ of certiorari to review the interlocutory order of the United States Court of Appeals for the Sixth Circuit.

Since we filed the petition in this already important Individuals with Disabilities in Education Act (IDEA) case on February 2, 2006, the stakes have become significantly higher for the Winkelmans and for other non-lawyer parents of disabled children who plan to litigate – or have already litigated – an IDEA case *pro se* in federal court. As we show in greater detail below, relying on the decision below and on *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756-57 (CA6 2005) – the prior opinion on which the Sixth Circuit based the decision below – the Cleveland Bar Association (1) has confirmed in documents filed publicly with the Ohio Supreme Court that it is presently investigating the Winkelmans' *pro se* litigation of the underlying appeal and may file an unauthorized practice of law (UPL) complaint against them, and (2) has already filed a UPL complaint against another set of non-lawyer parents because they litigated their disabled child's IDEA cases *pro se* in the United States District Court for the Northern District of Ohio.

Ohio Government Bar Rule VII allows local bar associations to establish unauthorized practice of law committees. *See* Ohio Gov't Bar R. VII § 4(A). The Cleveland Bar Association has established such a committee. Once

---

[1] Rule 15.8 expressly allows "[a]ny party [to] file a supplemental brief at any time while a petition for certiorari is pending, calling attention to * * * other intervening matter not available at the time of the party's last filing."

established, such a committee "shall investigate any matter * * * that comes to its attention and may file a complaint" with the Ohio Supreme Court Board of Commissioners on the Unauthorized Practice of Law, *id.* § 4(B), if it "believes probable cause exists to warrant a hearing on the complaint," *id.* § 5. "If the Board determines, by a preponderance of the evidence, that the respondent has engaged in the unauthorized practice of law, the Board shall file * * * its report with the Clerk of the [Ohio] Supreme Court ." *Id.* § 7(G). "The Board may recommend and the Court may impose civil penalties in an amount up to ten thousand dollars per offense." *Id.* § 8(B). "After a hearing on objections [to the Board's report], the [Ohio] Supreme Court shall enter an order as it finds proper." *Id.* § 19(D)(1). The Court may order "the respondent to reimburse the costs and expenses incurred by the Board and the [prosecuting local bar association,]" and, as noted earlier, may impose a civil penalty of up to ten thousand dollars per offense. *Id.* § 19(D)(1)(b) & (c).

Relevant to this case, the Cleveland Bar Association initiated an investigation into whether the Winkelmans engaged in UPL "because they chose to represent their child before the [Sixth Circuit] without being licensed attorneys." App., *infra*, 4a.[2] Although the Cleveland Bar Association has not yet filed a UPL complaint against the Winkelmans, it has filed one against another set of non-lawyer parents – Mr. and Mrs.

---

[2] The documents contained in the appendix to this supplemental brief were filed publicly with the Ohio Supreme Court, the Ohio Supreme Court's Board of Commissioners on the Unauthorized Practice of Law, or the United States District Court for the Northern District of Ohio. As documents filed with either another Court or administrative body, this Court may properly take judicial notice of them and their contents. *See, e.g., Nieman v. NLO, Inc.*, 108 F.3d 1546, 1554 (CA6 1997) (court may take judicial notice of public records); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (CA5 1996) (court may take judicial notice of agency documents); *see also generally* Charles Alan Wright & Kenneth W. Graham, Jr., 21B Fed. Prac. & Proc. Evid. 2d § 5106.4 (2005).

Brian J. Woods (the "Woodses") – who, like the Winkelmans, merely litigated their autistic son's IDEA cases *pro se* in federal court. *See id.* at 1a-3a (asserting that the Woodses engaged in the unauthorized practice of law when they litigated four IDEA cases *pro se* in the Northern District of Ohio on their disabled child's behalf).[3] The complaint against the Woodses seeks both a $10,000 fine and reimbursement of the prosecuting local bar association's costs and expenses. *See id.* at 3a.

Remarkably, the Cleveland Bar Association is prosecuting the Woodses for UPL even though their *pro se* federal court appearances predated by over three years the Sixth Circuit's *Cavanaugh* decision barring such appearances.[4] In light of the Cleveland Bar Association's willingness to apply *Cavanaugh* retroactively, it appears that it is only a matter of time before the Cleveland Bar Association files a UPL complaint against the Winkelmans, who filed the underlying appeal over a month before *Cavanaugh* was decided. Because every State has a UPL statute, the Cleveland Bar Association's actions also reveal that no parents who plan to litigate – or already have litigated – an IDEA case *pro se* in federal court on behalf of their disabled children are entirely safe from UPL prosecution, except those residing in the First Circuit and insulated by its decision in *Maroni v. Pemi-Barker Reg'l Sch. Dist.*, 346 F.3d 247 (CA1 2003), permitting parental *pro se* representation.

---

[3] In other documents filed by the Cleveland Bar Association, it makes clear that it is basing its UPL prosecution on the order underlying the petition in this case and on *Cavanaugh*. *See* App., *infra*, 9a.

[4] The Woodses filed the last of the four Northern District of Ohio cases on which the UPL charge is based on July 18, 2002 – over three years before the Sixth Circuit issued its August 19, 2005, decision in *Cavanaugh*. Because this information is presented in public dockets "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of it.

We have already shown in the petition that six courts of appeals are intractably divided over the question presented. *See* Pet. 11-13. We have already shown that the question presented recurs with frequency.[5] *See id.* at 13-14. And, while we have already shown that the question presented is sufficiently important to warrant this Court's immediate review, *see id.* at 14-17, the Cleveland Bar Association's decision to prosecute the Woodses for UPL and the impending prosecution of the Winkelmans for UPL exacerbates the need for this Court's prompt intervention.

As the petition explains, lawyers willing to represent families of disabled children are scarce. *See id.* at 14. Even if a lawyer is willing to represent the family of a disabled child, most families are insufficiently "rich" to afford a lawyer, and the IDEA's attorneys' fee provision is an insufficient incentive to encourage contingency or *pro bono* representation. *Id.* at 14-15. In the Sixth Circuit below – and where parents do not have their own procedural IDEA claims,

---

[5] In addition to the four post-*Cavanaugh* cases noted in the petition in which the question presented has recurred, *see* Pet. 14, we have since located three other cases. One of these three newly-discovered cases has a decision available on Westlaw: *Green v. Cape Henlopen Sch. Dist.*, No. Civ.A. 04-920 KAJ, 2005 WL 3413320, *4 (D. Del. Dec. 13, 2005). The two others do not: *Peters v. Guajome Park Academy Charter Sch.*, No. 04cv1259-BEN (POR) (S.D. Cal. filed June 22, 2004); *Courtney B. v. San Ramon Valley Unified Sch. Dist.*, No. C 04-04876 JSW (N.D. Cal. filed Nov. 16, 2004). We emphasize that our knowledge of the frequency with which this issue recurs is necessarily under-inclusive. This is because such a small fraction – well under ten percent – of district court decisions are available on Westlaw or Lexis. *See* Margo Schlanger & Denies Liberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 MO. K.C. L. REV. —, — (forthcoming 2006) (noting that "only a small percentage of cases have any library-accessible opinions at all" and that in 2004, only 8.7% of all district court "terminations" – decisions disposing of a case – were available on Westlaw). Accordingly, it is almost certain that the question presented recurs with much greater frequency than we have been able to demonstrate with specific case citations.

in the Second, Third, Seventh, and Eleventh Circuits – parents who are unable to find or afford a lawyer are precluded from litigating an IDEA case *pro se* in federal court. *See id.* at 15-16.

Absent this Court's prompt determination whether, and if so, under what circumstances, non-lawyer parents may litigate an IDEA case *pro se* in federal court, overzealous bar prosecutors in any state outside the First Circuit may follow the Cleveland Bar Association's lead and seek to punish parents for attempting to vindicate their disabled children's IDEA rights in federal court the only way that, as a practical matter, many can do so – as *pro se* litigants. This will necessarily have an undesirable chilling effect even if UPL charges are never sustained. The specter of a UPL complaint and the annoyance and lost time associated with defending against such a complaint (time better spent caring for the disabled child) – in addition to any available monetary penalty (money better spent providing for the disabled child) – will deter parents in those states – most already significantly disadvantaged, *see* Pet. 14-15 – from attempting to vindicate their disabled children's IDEA rights.

In addition to the reasons already stated in the petition, this Court should grant the petition and reverse the order below to prevent unwarranted intrusions by overzealous bar prosecutors into the effective enforcement of the IDEA.

Respectfully submitted,

JEAN-CLAUDE ANDRE
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
Tel./Fax: (310) 558-0932

March 30, 2006

APPENDIX A

BEFORE THE
BOARD OF COMMISSIONERS
ON THE UNAUTHORIZED PRACTICE OF LAW
THE SUPREME COURT OF OHIO

In re:	)	
CLEVELAND BAR	)	
ASSOCIATION	)	**CASE NO.: UPL 06-02**
1301 East Ninth Street,	)	
Second Level	)	(Filed February 13, 2006)
Cleveland, Ohio 44114	)	
	)	
Relator,	)	
	)	
vs.	)	
	)	
BRIAN J. WOODS, SR.	)	
584 North Hawkins Avenue	)	
Akron, Ohio 44313	)	
	)	
and	)	
	)	
SUSAN WOODS	)	
584 North Hawkins Avenue	)	
Akron, Ohio 44313	)	
	)	
Respondents.	)	

COMPLAINT AND CERTIFICATE

Relator, The Cleveland Bar Association, through its Unauthorized Practice of Law Committee, for its Complaint states as follows:

1. The Relator, Cleveland Bar Association is primarily made up of members who are Attorneys at Law practicing in Northeast Ohio.

2. The Cleveland Bar Association, through its Unauthorized Practice of Law Committee is authorized by Ohio Supreme Court Rule for the Government of the Bar VII to file a Complaint with the Board regarding the unauthorized practice of law.

3. The Respondents are not now and never have been attorneys admitted to practice, granted active status and certified to practice law in the State of Ohio or any other state pursuant to Ohio Supreme Court Rules I, II, VI, IX, XI of this Court's Rules for the Government of the Bar.

4. Brian Woods a/k/a Brian J. Woods a/k/a Brian J. Woods, Sr. and Susan Woods have appeared in federal court before Judge Polster representing Daniel A. Woods in Case No. 5:02-cv-1383; Case No. 5:02-cv-704; Case No. 5:02-cv-225; and Case No. 5:01-cv-2556.

5. Such legal representation of Daniel A. Woods in federal court is prohibited under both federal common law in Ohio, as well as, state law under the Supreme Court of Ohio Rules, Regulations, Orders, and decisions.

WHEREFORE, Relator Cleveland Bar Association respectfully requests that the Board find that Respondents have engaged in the unauthorized practice of law and request further that the Board render a finding and report to the Supreme Court of Ohio to such effect: (i) recommending that

Respondents be enjoined from practicing law in Ohio, under whatever name of label, unless and until each one has taken and passed the Ohio Bar examination and been administered the Oath of Admissions; (ii) recommending recovered by Relator of its costs and expenses herein from the Respondents; (iii) recommending that the Respondents be fined no less than $10,000; and (iv) all further relief deemed appropriate under the circumstances.

Respectfully submitted,

MICHAEL P. HARVEY CO., L.P.A.

/s

Michael P. Harvey, Esq. (#0039369)
311 Northcliff Drive
Rocky River, Ohio 44114-1344
Office: (440) 356-9108
Fax: (440) 356-9128
Cell: (440) 570-2812
E-Mail: MPHarveyCo@aol.com

Attorney for Relator Cleveland Bar Association Unauthorized Practice of Law Committee

APPENDIX B

THE SUPREME COURT OF OHIO

In re:	) (Filed February 21, 2006)
	)
CLEVELAND BAR ASSOCIATION	) **THE SUPREME COURT**) **OF OHIO CASE NO.:**) **2006-0357**
Relator,	)
	)
vs.	) **CLEVELAND BAR**) **ASSOCIATION CASE**
BRIAN J. WOODS, SR.	) **NO.: 050112-01**
	)
Respondent.	)

MEMORANDUM IN SUPPORT OF MOTION TO SHOW CAUSE

I. DISCUSSION

The Cleveland Bar Association's Unauthorized Practice of Law Committee was asked to investigate the alleged unauthorized practice of law by the Winkelman's, whose Sixth Circuit Appeal was recently dismissed because they chose to represent their child before that Court without being licensed attorneys or admitted to the practice of law in any state. Mr. Woods was initially a witness whose deposition was subpoenaed as part of the Winkelman UPL investigation.

But, after being twice subpoenaed and Ordered by the Commission to appear for a deposition, Mr. Woods has failed to do so.

The Relator, Cleveland Bar Association, filed a Motion to Compel with the Board of Commissioners for the Unauthorized Practice of Law who issued an Order compelling Mr. Woods' attendance if the Relator, Cleveland Bar Association provided notice to Mr. Woods both by regular and certified mail as well as copy to the Board of Commissioners. The Relator complied with this request. Five (5) days before the scheduled deposition, Mr. Woods requested a stay of the deposition, essentially claiming a "conspiracy" against him. This last minute request was denied by the Commission who served Mr. Woods personally with the Order before the deposition as well as phoned him at the only phone number everyone has for him, which was given to us by the Winkelmans, advising him that he needed to appear as scheduled on Friday, February 3, 2006 at 10:00 a.m. at the Cleveland Bar Association.

On February 3, 2006 the undersigned counsel was again in attendance for Mr. Woods' deposition but he failed to attend. Also in attendance was the Chairperson of the Unauthorized Practice of Law Committee who likewise noted Mr. Woods' failure to appear in violation of both subpoena and Commission Order.

Unfortunately, it is necessary to invoke the jurisdiction of the Ohio Supreme Court. Mr. Woods has no interest in being asked questions relating to the unauthorized practice of law committed by Mr. and Mr. Winkelman quite possibly with his assistance and guidance. In the course of that investigation, we have also discovered Mr. Woods may well have his own unauthorized practice of law issues along the same lines as the Winkelmans for which a separate Complaint is being filed.

Since the Board of Commissioners issued an Order requiring Mr. Woods to appear and he failed to appear, the

Relator, Cleveland Bar Association, has no other option but to seek application of this Court for an Order finding Mr. Woods in contempt of this Court and sanctioning him for costs and attorneys' fees for his willful disobedience of both lawful process under Rule 45 and willful disobedience of the Board of Commissioner's Orders. See *Cincinnati Bar Association v. Adjustment Service Corp.* (2000), 89 Ohio St. 3d 385.

II. CONCLUSION

WHEREFORE, for the reasons stated above, the Ohio Supreme Court is requested to find Mr. Brian J. Woods, Sr. in contempt of this Court and to Order Mr. Woods to appear before the Relator Cleveland Bar Association at a date and time convenient to the Relator for his deposition *duces tecum* not only as it relates to the Winkelmans' alleged unauthorized practice of law but also his own alleged unauthorized practice of law issues.

Furthermore, the Ohio Supreme Court is asked to fine Mr. Brian J. Woods, Sr. in an amount that this Court deems appropriate for his willful disobedience; to assess court costs and the costs of the Relator Cleveland Bar Association relating to serving Mr. Woods the subpoenas as well as any other related costs incurred by the Cleveland Bar's Unauthorized Practice of Law Committee; and finally, that Mr. Woods be Ordered to pay reasonable attorneys' fees to the Cleveland Bar Association in the amount of $500.00 as further sanction for the three failed efforts without valid excuse.

Respectfully submitted,

MICHAEL P. HARVEY CO., L.P.A.

/s_____

Michael P. Harvey, Esq. (#0039369)
311 Northcliff Drive
Rocky River, Ohio 44114-1344
Office: (440) 356-9108
Fax: (440) 356-9128
Cell: (440) 570-2812
E-Mail: MPHarveyCo@aol.com

Attorney for Relator

APPENDIX C

THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CLEVELAND BAR ASSOCIATION,	) (Filed March 16, 2006)
	)
	) **CASE NO.: 5:06-cv-00462-**
Relator,	) **PCE**
	)
vs.	) **OHIO SUPREME COURT**
	) **UPL CASE NO.: 06-02**
BRIAN J. WOODS, SR.	)
	) **JUDGE PETER C.**
and	) **ECONOMOUS**
	)
SUSAN A. WOODS	) **MAGISTRATE JUDGE**
	) **JAMES S. GALLAS**
Respondents.	)

RELATOR'S REQUEST TO REMAND AND/OR FOR ABSTENTION

The Relator, Cleveland Bar Association, filed a Complaint with the Board on the Unauthorized Practice of Law of the Ohio Supreme Court pursuant to Ohio Gov. Bar R. VII, § 5 against Brian J. Woods, Sr. and Susan Woods being assigned Case No. UPL 06-02.

Additionally, both the Relator and Respondents have respectively filed Motions to Show Cause and Objections with the Ohio Supreme Court to enforce or challenge Orders of the Board on the Unauthorized Practice of Law on the authority of

Cincinnati Bar Association v. Adjustment Service Corp. (2000), 89 Ohio St. 385 regarding Mr. Brian J. Woods' failure to appear at two (2) subpoenaed depositions and his most recent failure to appear for deposition pursuant to an Order of the Board on the Unauthorized Practice of Law.

The Relator's UPL Complaint No. 06-02 is based on the Respondents engaging in the alleged unauthorized practice of law when they appeared in the Northern District of Ohio before Judge Daniel A. Polster in four (4) cases *pro se* on behalf of their son Daniel as attorneys-in-fact. Contrary to Respondents' assertion on page two of the Notice of Removal, however, the UPL Complaint is not based upon Respondents' administrative activities that occurred prior to representing their son Daniel in federal court.

The 6th Circuit has unequivocally stated in *Jacob Winkelman v. Parma City School District* (2005), 6th Cir. Case No. 05-3886 attached to the Respondents' materials filed with this Court that a non-lawyer parent is not permitted to represent a child in federal court on IDEA claims. The 6th Circuit cited also to *Cavanaugh v. Cardinal Local School District*, 409 F.3d 753, 756-57 (6th Cir. 2005) as further support for this holding.

The Winkelmans have requested and received a stay pending their Petition for Writ of Certiorari to the U.S. Supreme Court. This stay is not directed at Relator or Respondents.

For the reasons set forth in the accompanying Memorandum in Support attached hereto, the Relator Cleveland Bar Association respectfully requests that this Court remand this matter back to the Board on the Unauthorized Practice of Law of the Ohio Supreme Court or abstain and return it to state court.

Respectfully submitted,

MICHAEL P. HARVEY CO., L.P.A.

/s

Michael P. Harvey, Esq. (#0039369)
311 Northcliff Drive
Rocky River, Ohio 44114-1344
Office: (440) 356-9108
Fax: (440) 356-9128
Cell: (440) 570-2812
E-Mail: MPHarveyCo@aol.com

Attorney for Relator

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN *et al.*, *Petitioners,*

v.

PARMA CITY SCHOOL DISTRICT, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JEAN-CLAUDE ANDRE
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Avenue
Los Angeles, CA 90034
Tel./Fax: (310) 558-0932

May 8, 2006

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In our March 30, 2006, supplemental brief, we brought to this Court's attention the Cleveland Bar Association's investigation into whether petitioners Jeff and Sandee Winkelman (the "Winkelmans") engaged in the unauthorized practice of law ("UPL"), "because they chose to represent their child before the [Sixth Circuit] without being licensed attorneys." Supp. Br. at 2 (quoting Supp. Br. App. at 4a). We also brought to the Court's attention the Cleveland Bar Association's pending UPL complaint seeking both a $10,000 fine and reimbursement of costs and expenses against another set of non-lawyer parents – Mr. and Mrs. Brian J. Woods (the "Woodses") – who, like the Winkelmans, merely prosecuted their autistic son's IDEA cases *pro se* in federal court. *See id.* at 2-3. We argued that these developments "exacerbate[d] the need for this Court's prompt intervention." *Id.* at 4.

Having initially brought these issues to the Court's attention, we believe that it is our obligation to provide the Court an update on relevant recent developments. *See* Sup. Ct. R. 15.8. These developments confirm not only that the question presented requires this Court's prompt intervention, but that the Bar Association expressly agrees that this Court "should * * * resolve the unsettled state of the law in this important area of federal law * * * as soon as possible." *Infra* at 3 (citations omitted).

On April 20, 2006 – after respondent's BIO and our reply were filed – the Ohio Supreme Court ordered "the Cleveland Bar Association to show cause, through the production of evidence, within 20 days of the date of this order, why the complaint it has filed against [the Woodses] * * * should not be dismissed" because "[i]t appear[ed] to the court from the evidence presented that [they] ha[ve] not engaged in the unauthorized practice of law." *Cleveland Bar Ass'n v. Woods*, 109 Ohio St. 3d 1418 (2006) (order).

The *Cleveland Plain Dealer* responded to the order with two articles. The first reported generally on the status of the *Woods*

UPL case and the petition in this case.[1] *See* Patrick O'Donnell, *Bar Association Battles Parents; Says Couple Served as Lawyers*, PLAIN DEALER (Cleveland), Apr. 27, 2006, at B1, *available at* 2006 WLNR 7131552. The second – a staff editorial – criticized the Cleveland Bar Association for bringing the UPL complaint against the Woodses. Opinion, *Lawyers v. Parents*, PLAIN DEALER (Cleveland), May 2, 2006, at B8, *available at* 2006 WLNR 7517025. It also argued that a rule prohibiting parental *pro se* prosecution of an IDEA case in federal court "presumes an ideal world – one in which all parents have the resources to secure * * * representation – or at least a world in which ample numbers of lawyers are willing to work cases on a pro bono basis." *Id.*

Contrary to respondent's suggestion that low-cost lawyers, *pro bono* lawyers, or lawyers willing to take-on an IDEA case based on the *possibility* of a statutory fee award significantly mitigate the inability of families with disabled children to obtain counsel, *see* BIO at 17-18, the editorial observed that "agencies that provide these kind of legal services to families report having to turn away the overwhelming majority of requests because of a lack of resources."[2] *Id.* Finally, the editorial noted that this Court "has a chance to resolve th[e] judicial confusion" over the question presented by granting the petition here. *Id.*

On May 3, 2006, the Cleveland Bar Association announced that it will dismiss the UPL complaint against the Woodses. In

---

[1] This was not the first newspaper article devoting significant attention to the petition and the important question presented. *See generally* Patrick O'Donnell, *Parents Seek Right To Argue Case in Court*, PLAIN DEALER (Cleveland), Dec. 25, 2005, at B5.

[2] The staff editorial's observations are consistent with the comprehensive data reported by the *amici* in this case. *See* Br. *Amici Curiae* Autism Soc'y of Am. *et al.* at 8-9; Br. *Amici Curiae* Council of Parent Attorneys & Advocates *et al.* at 9-11; *see also* Adam Liptak, *Nonlawyer Father Wins His Suit Over Education, and the Bar Is Upset*, N.Y. TIMES, May 6, 2005, at A8, *available at* 2006 WLNR 7774997 (reporting that the Winkelmans "simply could not afford a lawyer").

reference to this case, the Bar Association's president noted that "[t]he U.S. Supreme Court should first resolve the unsettled state of the law in this important area of federal law," Patrick O'Donnell, *Lawyers Group Drops Case Against Parents*, PLAIN DEALER (Cleveland), May 5, 2006, at B3, *available at* 2006 WLNR 7763338 (quoting P. Kelly Tompkins, President, Cleveland Bar Ass'n, and discussing this case); *see also* Liptak, *supra*, at A8 ("The association should not have considered filing the complaint, [Tompkins] said, until after the United States Supreme Court acted in a case it might decide to hear this month."). In a separate letter to the editor of the *Plain Dealer*, he urged this Court to do so "as soon as possible." P. Kelly Tompkins, Letter to the Editor, PLAIN DEALER (Cleveland), May 5, 2006, at B8, *available at* http://www.cleveland.com/search/index.ssf?/base/opinion/1146817879278 90.xml?oxlet&coll=2.

Nonetheless, the Bar Association maintains that it has a "technical legal basis" for bringing UPL charges against parents like the Woodses and Winkelmans, *id.*, and "refused to rule out the possibility of further action [against the Woodses] after the Supreme Court acted in the Winkelman case," Liptak, *supra*, at A8. Nor has the Bar Association made any promises to drop its investigation into the Winkelmans' alleged UPL. Accordingly, it is possible that the Bar Association may re-file its complaint against the Woodses and/or file a UPL complaint against the Winkelmans if this Court allows the decision below to stand (either by denying review or by granting review and affirming on the merits). For this reason, as the *New York Times* noted, the Bar Association has only "[s]ort of" "backed down." Liptak, *supra*, at A8.

Whatever the likelihood that a future UPL prosecution will be based on the decision below, the swell of recent public and media attention to the *Woods* case and to this case confirms the importance of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEAN-CLAUDE ANDRE
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034
(310) 558-0932

May 8, 2006

(1)

FILED
SEP 20 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-983

In the Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL., PETITIONERS

v.

PARMA CITY SCHOOL DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record
WAN J. KIM
Assistant Attorney General
GREGORY G. GARRE
Deputy Solicitor General
DAVID B. SALMONS
Assistant to the Solicitor General
DAVID K. FLYNN
GREGORY B. FRIEL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KENT D. TALBERT
General Counsel
Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

To what extent, if any, may a non-lawyer parent of a minor child with a disability proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*

TABLE OF CONTENTS

Page

Statement 1

Discussion 4

A. The circuits are divided on when parents may appear *pro se* in a civil action brought pursuant to IDEA 4

B. The Sixth Circuit's limitation on the ability of parents to appear *pro se* in civil actions under IDEA is inconsistent with the terms, structure, and purposes of the Act 10

Conclusion 19

TABLE OF AUTHORITIES

Cases:

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 126 S. Ct. 2455 (2006) 9

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 18

C.O. v. *Portland Pub. Schs.*, 406 F. Supp. 2d 1157 (D. Or. 2005) 8

Carpenter v. *Children & Youth Servs.*, 64 Fed. Appx. 850 (3d Cir.), cert. denied, 540 U.S. 819 (2003) 8

Cavanaugh v . *Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005) 3, 4, 6, 7, 8

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 17

Cheung v. *Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2d Cir. 1990) 6

Cases—Continued: Page

Collinsgru v. *Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998) 4, 6, 8, 10, 11
D.K. ex rel. Kumetz-Coleman v. *Huntington Beach Union High Sch. Dist.*, 428 F. Supp. 2d 1088 (C.D. Cal. 2006) 8
Devine v. *Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997), cert. denied, 522 U.S. 1110 (1998) 8
Emery v. *Roanoke City Sch. Bd.*, 432 F.3d 294 (4th Cir. 2005) 14
Fauconier v. *Committee on Special Educ.*, 112 Fed. Appx. 85 (2d Cir. 2004) 8
FEC v. *Akins*, 524 U.S. 11 (1998) 10
Florence County Sch. Dist. Four v. *Carter*, 510 U.S. 7 (1993) 13
Hammer v. *Department of Educ.*, 85 F. Supp. 2d 191 (E.D.N.Y. 2000) 8
Honig v. *Doe*, 484 U.S. 305 (1988) 5
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 16
Maroni v. *Pemi-Baker Reg'l Sch.*, 346 F.3d 247 (1st Cir. 2003) 4, 7, 8, 10
Martin v. *Hadix*, 527 U.S. 343 (1999) 16
Meeker v. *Kercher*, 782 F.2d 153 (10th Cir. 1986) 6
Montclair Bd. of Educ. v. *M.W.D.*, No. 05-4536, 2006 WL 1524989 (3d Cir. June 5, 2006) 8
Morgan v. *Potter*, 157 U.S. 195 (1895) 5
Mosely v. *Board of Educ.*, 434 F.3d 527 (7th Cir. 2006) 8
Murphy v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002) 8

Cases—Continued: Page

Myers v. *Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005) 6
NASA v. *Federal Labor Relations Auth.*, 527 U.S. 229 (1999) 11
Navin v. *Park Ridge Sch. Dist. 64*, 270 F.3d 1147 (7th Cir. 2001) 8
Russell v. *Department of Educ.*, No. 04-15482, 2006 WL 1876898 (9th Cir. June 29, 2006) 8
Schaffer v. *Weast*, 126 S. Ct. 528 (2005) 2, 9, 11, 16, 17
School Comm. v. *Department of Educ.*, 471 U.S. 359 (1985) 5
Shevtsov v. *Los Angeles Unified Sch. Dist.*, 134 F.3d 379 (9th Cir. 1998) 8
Snyder v. *New York State Educ. Dep't*, 11 Fed. Appx. 38 (2d Cir. 2001) 8
Tindall v. *Poultney High Sch. Dist.*, 414 F.3d 281 (2d Cir. 2005) 8
Wenger v. *Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998), cert. denied, 526 U.S. 1025 (1999) 7, 8
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 5
Winkelman v. *Parma City Sch. Dist.*, 166 Fed. Appx. 807 (6th Cir. 2006) 3

Statutes and rule:

Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* 1
20 U.S.C. 1400(c)(2)(D) 13
20 U.S.C. 1400(c)(2)(E) (2000) 12
20 U.S.C. 1400(c)(3) 2, 12
20 U.S.C. 1400(d)(1)(A) 2

Statutes and rule–Continued: Page

20 U.S.C. 1400(d)(1)(B) 1, 2
20 U.S.C. 1401(9) 13
20 U.S.C. 1401(29) 13
20 U.S.C. 1412(a)(1)(A) 2
20 U.S.C. 1412(a)(4) 2
20 U.S.C. 1412(a)(10)(B)(i) 13
20 U.S.C. 1412(a)(10)(C)(ii) 13
20 U.S.C. 1414(d) 2
20 U.S.C. 1414(d)(1)(B) 12
20 U.S.C. 1415(a) 12
20 U.S.C. 1415(b)(1) 12
20 U.S.C. 1415(b)(3) 12
20 U.S.C. 1415(b)(6) (2000) 5
20 U.S.C. 1415(b)(6) 10
20 U.S.C. 1415(b)(6)(A) 2
20 U.S.C. 1415(b)(7) (2000) 5
20 U.S.C. 1415(b)(8) 10
20 U.S.C. 1415(d)(1)(B) 12
20 U.S.C. 1415(f)(1)(A) 2
20 U.S.C. 1415(f)(3)(E)(ii) 12
20 U.S.C. 1415(g)(1) 2, 11
20 U.S.C. 1415(h) 17
20 U.S.C. 1415(h)(2) 10
20 U.S.C. 1415(i) 16
20 U.S.C. 1415(i)(2) 3
20 U.S.C. 1415(i)(2)(A) 2, 5, 6, 10, 11
20 U.S.C. 1415(i)(3)(B) (2000) 14
20 U.S.C. 1415(i)(3)(B) 14

Statutes and rule–Continued: Page

20 U.S.C. 1415(i)(3)(B)(i) 15
20 U.S.C. 1415(i)(3)(B)(i)(I) 14
20 U.S.C. 1415(i)(3)(B)(i)(III) 18
20 U.S.C. 1415(i)(3)(D)(i) 14
20 U.S.C. 1415(i)(3)(D)(i)(III) 14
20 U.S.C. 1415(i)(3)(E) 14
20 U.S.C. 1415(i)(3)(F) 16
Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (to be codified at 20 U.S.C. 1400 *et seq.*) 1
§ 302(a)(1), 118 Stat. 2803 16
28 U.S.C. 1654 ..... 5, 6, 10, 17, 18
Fed. R. Civ. P. 17(c) 5

Miscellaneous:

Black's Law Dictionary (8th ed. 2004) 10
150 Cong. Rec. S5430 (daily ed. May 13, 2004) 16
H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. (2004) .. 17

In the Supreme Court of the United States

No. 05-983

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL., PETITIONERS

v.

PARMA CITY SCHOOL DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities.[1] The Act explicitly seeks to protect the rights of parents as well as children. See 20 U.S.C. 1400(d)(1)(B) (IDEA seeks "to ensure that the rights of children with disabilities and parents of such children are protected."). Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education," which includes special education and related services necessary to meet the

[1] Congress reauthorized and amended IDEA in 2004. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (to be codified at 20 U.S.C. 1400 *et seq.*). Unless otherwise indicated, citations are to the statute as amended in 2004.

child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). The Act guarantees "children with disabilities *and the families of such children* access to a free appropriate public education." 20 U.S.C. 1400(c)(3) (emphasis added).

IDEA requires local school systems to develop an individualized education program (IEP) for each child with a disability. See 20 U.S.C. 1412(a)(4), 1414(d). "Parents and guardians play a significant role in the IEP process." *Schaffer* v. *Weast*, 126 S. Ct. 528, 532 (2005). For example, parents are members of the "IEP team" that develops an IEP for their child. 20 U.S.C. 1414(d)(1)(B).

Parents may file an administrative complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6)(A). Parents are likewise entitled to "an impartial due process hearing" on their complaint before either the local or state educational agency. 20 U.S.C. 1415(f)(1)(A). If the local agency conducts the due process hearing, "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). After exhausting administrative remedies, "[a]ny party aggrieved by the findings and decision" made in the administrative proceedings has "the right to bring a civil action * * * in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. 1415(i)(2)(A).

2. Petitioners are Jeff and Sandee Winkelman and their son, Jacob, who is afflicted with autism spectrum disorder. Pet. 1-2. The respondent school district proposed an IEP for the 2003-2004 school year that would have placed Jacob at a public elementary school. Pet. App. 4a-5a. Jacob's parents believed the proposed IEP was inadequate and requested a due process hearing in which they alleged that respondent had failed to provide a free appropriate public education for their son. *Ibid.*

In February 2004, the administrative hearing officer issued a decision finding that respondent had provided Jacob with a free appropriate public education as required by IDEA. *Id.* at 6a. Petitioners appealed to a state-level review officer, who affirmed the hearing officer's decision. *Ibid.*

3. On July 15, 2004, petitioners filed an action in federal court pursuant to 20 U.S.C. 1415(i)(2), challenging the administrative decision rejecting their IDEA claims. Pet. App. 6a; Compl. The complaint listed three plaintiffs: Jacob's parents and Jacob "by and through" his parents. Compl. 1. Petitioners alleged that respondent violated both IDEA's procedural requirements and its substantive guarantee by failing to provide Jacob a free appropriate public education. *Id.* at 7; see Pet. App. 10a-22a. Petitioners sought, *inter alia*, reimbursement for the cost of educating Jacob at a private school specializing in children with autism. Compl. 10; Pet. App. 6a. On June 2, 2005, the district court rejected all of petitioners' IDEA claims and granted judgment in favor of respondent. Pet. App. 3a-23a.

4. Petitioners filed two *pro se* appeals. The first appeal challenged the district court's denial of a preliminary injunction regarding Jacob's "stay-put" placement at the learning center he had attended. See No. 04-4159 (6th Cir.). On September 20, 2005, the Sixth Circuit ordered dismissal of that appeal unless petitioners retained counsel within 30 days. Resp. Br. in Opp. App. 2b-4b (Resp. App.). The court relied on its prior decision in *Cavanaugh* v. *Cardinal Local School District*, 409 F.3d 753 (6th Cir. 2005), which held that IDEA does not grant parents the right to represent their child *pro se* in federal court and that "parents cannot pursue their own substantive IDEA claim *pro se*." Resp. App. 3b (citing *Cavanaugh*, 409 F.3d at 756-757). In response to the Sixth Circuit's order, petitioners retained counsel. *Id.* at 5b-7b. On January 25, 2006, the Sixth Circuit affirmed the denial of the preliminary injunction. See *Winkelman* v. *Parma City Sch. Dist.*, 166 Fed. Appx. 807, 808-811 (6th Cir. 2006).

Petitioners also filed a *pro se* appeal from the district court's merits decision. See No. 05-3886 (6th Cir.). On November 4, 2005, the court of appeals ordered dismissal of that appeal unless petitioners retained counsel within 30 days. Pet. App. 1a-2a. Relying on its order in petitioners' preliminary injunction appeal, the Sixth Circuit stated that "Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*." *Id.* at 2a. Petitioners seek review of that order in this Court.

5. On December 2, 2005, Justice Stevens issued a stay of the Sixth Circuit's order of November 4, 2005, pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Petitioners filed their petition for a writ of certiorari on February 2, 2006.

DISCUSSION

The Court should grant the petition for a writ of certiorari and decide to what extent, if any, parents of children with disabilities may proceed *pro se* in a federal court action pursuant to IDEA. As several courts of appeals, including the Sixth Circuit, have expressly acknowledged, the circuits are divided on that question. *Cavanaugh* v. *Cardinal Local Sch. Dist.*, 409 F.3d 753, 757 (6th Cir. 2005); *Maroni* v. *Pemi-Baker Regional Sch. Dist.*, 346 F.3d 247, 250 (1st. Cir. 2003); *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998). The Sixth Circuit's holding barring parents from appearing *pro se* in civil actions under the Act is inconsistent with the plain language, structure, and purposes of IDEA. Resolution of this conflict is warranted in view of the critical interests involved in IDEA litigation, the recurring nature of the question presented, and the need to ensure IDEA's uniform application.

A. The Circuits Are Divided On When Parents May Appear *Pro Se* In A Civil Action Brought Pursuant To IDEA

1. IDEA provides that "[a]ny party aggrieved by the findings and decision" made in a due process hearing or

administrative appeal under the statute may bring a civil action in state or federal court. 20 U.S.C. 1415(i)(2)(A). This Court has recognized that parents are among those who may file a civil action under IDEA. See *Honig* v. *Doe*, 484 U.S. 305, 312 (1988) ("At the conclusion of [a due process] hearing, both the parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state or federal court."); *School Comm. of Burlington* v. *Dep't of Educ.*, 471 U.S. 359, 361 (1985) (noting "the right of the parents * * * to challenge in administrative and court proceedings a proposed IEP with which they disagree"). Indeed, Congress expressly provided that parents may file administrative complaints "with respect to any matter relating to * * * the provision of a free appropriate public education" to their children, and it specifically required that "*the parent* of a child with a disability" shall "provide notice" to the educational agency in the complaint concerning, *inter alia*, "a description of the nature of the problem of the child" under the school's proposed placement and "a proposed resolution of the problem to the extent known and available to *the parents* at the time." 20 U.S.C. 1415(b)(6) and (7) (2000) (emphases added).

This Court, however, has not addressed whether parents are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) entitled to sue on their own behalf or, instead, whether their right to file an IDEA lawsuit arises derivatively such that the parents cannot represent themselves *pro se*.[2] That issue is key to the resolution

[2] The parents' right to file an IDEA action could stem, for example, from Rule 17(c) of the Federal Rules of Civil Procedure, which permits a parent or other guardian to "sue or defend on behalf" of a minor child. If a child is a "party aggrieved" under IDEA, a parent could rely on Rule 17(c) to file an IDEA suit in federal court on the child's behalf. But when a parent sues as "next friend" of his or her minor child, "[i]t is the infant, and not the next friend, who is the real and proper party." *Morgan* v. *Potter*, 157 U.S. 195, 198 (1895); cf. *Whitmore* v. *Arkansas*, 495 U.S. 149, 163 (1990). Thus, when parents sue solely as representatives of their children under Rule 17(c), the parents are not "parties" who are "conduct[ing] their own cases" for purposes of 28 U.S.C. 1654, and they may not represent other individuals, including their children, in

of the question presented by this case because Congress has provided that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." 28 U.S.C. 1654 (emphasis added). Thus, if parents are "part[ies] aggrieved" for purposes of 20 U.S.C. 1415(i)(2)(A), then they are entitled under the general federal rule embodied in 28 U.S.C. 1654 to proceed *pro se* in a federal court action under IDEA.

2. The courts of appeals are divided on the question whether parents are themselves "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A), and are therefore entitled to proceed *pro se* on their own IDEA claims in federal court. The Third Circuit has held that parents who file IDEA lawsuits in federal court may proceed *pro se* only on their own procedural claims. *Collinsgru*, 161 F.3d at 230-236. That court concluded—by a divided decision—that parents have no substantive rights of their own under IDEA, and that they therefore cannot proceed without an attorney in federal court when bringing substantive IDEA claims relating to the provision of a free appropriate public education to their children. *Id.* at 227, 232-236. Judge Roth dissented from that ruling, reasoning that parents enjoy "joint rights with their [children] under the IDEA which they may pursue *pro se* in the federal courts." *Id.* at 237; see *id.* at 237-240.

Agreeing with the Third Circuit in *Collinsgru*, the Sixth Circuit has held that parents cannot proceed *pro se* on behalf of their children under IDEA and that parents have no substantive claim of their own to a free appropriate public education. *Cavanaugh*, 409 F.3d at 755-758. In adopting that position, the Sixth Circuit expressly rejected the position of the First Circuit, which has held that parents may proceed *pro se* under IDEA. *Id.* at 757. The Sixth Circuit relied on *Cavanaugh* in the present

---

court. See, *e.g.*, *Collinsgru*, 161 F.3d at 232; *Myers* v. *Loudoun County Pub. Schs.*, 418 F.3d 395, 401 (4th Cir. 2005); *Cheung* v. *Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker* v. *Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (per curiam). As discussed, the parents in this case sought to litigate under IDEA in their own right. See pp. 3-4, *supra*.

case in ordering dismissal of petitioners' appeals unless they retained counsel. See Pet. App. 2a; Resp. App. 2b-4b.[3]

By contrast, the First Circuit has expressly rejected the reasoning of the Third Circuit in *Collinsgru* and instead held that "parents are 'parties aggrieved' within the meaning of IDEA, 20 U.S.C. § 1415(i)(2)(A), and thus may sue *pro se*, * * * regardless of whether the rights asserted are procedural or substantive." *Maroni*, 346 F.3d at 250. As the court explained, "[i]f parents are indeed parties under IDEA, they may proceed *pro se* under 28 U.S.C. 1654." 346 F.3d at 249. In light of its holding that parents are themselves aggrieved parties under IDEA, the First Circuit found it unnecessary to decide whether "courts should create an exception exempting IDEA cases from the usual common law rule preventing non-attorney parents from proceeding pro se on behalf of their minor children." *Ibid.*; see *id.* at 251, 258 n.13.[4]

---

[3] The parties disagree as to whether the Sixth Circuit's rule also prohibits parents from pursuing their procedural claims *pro se*. Compare Pet. 11-13, with Br. in Opp. 19-23. Petitioners appear to have the better view. Although recognizing that parents have procedural rights under IDEA, the court in *Cavanaugh* stated that those "procedural rights exist only to ensure that the child's substantive right to a [free appropriate public education] is protected." 409 F.3d at 757. It therefore concluded that "any right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to receive a [free appropriate public education], and wholly dependent upon the Cavanaughs' proceeding, through counsel, with their appeal on [their son's] behalf." *Ibid.* Although the parents in *Cavanaugh* appear to have raised only a substantive claim concerning the denial of a free appropriate public education, the Sixth Circuit applied its reasoning in *Cavanaugh* to preclude petitioners from appearing *pro se* on *both* their substantive and procedural IDEA claims in this case. Pet. App. 2a (Petitioners "are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*."); Resp. App. 4b (requiring dismissal of entire appeal).

[4] The Second and Seventh Circuits have held that parents may proceed *pro se* on their own procedural claims under IDEA, but must retain an attorney if they wish to pursue IDEA claims on behalf of their children. *Wenger* v. *Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124-126 (2d Cir. 1998), cert. denied,

3. This Court should grant the petition for a writ of certiorari to resolve this inter-circuit conflict. The Third Circuit adopted its interpretation of IDEA in *Collinsgru* in 1998, and the inter-circuit conflict has existed since 2003, when the First Circuit issued its *Maroni* decision. That conflict deepened in 2005, when the Sixth Circuit decided *Cavanaugh*, and the court of appeals' treatment of petitioners' claims, including procedural claims, in this case has further exacerbated the conflict. See note 3, *supra*. In addition, the question presented is frequently recurring in IDEA litigation,[5] which has itself increased in recent years, see

---

526 U.S. 1025 (1999); *Mosely* v. *Board of Educ.*, 434 F.3d 527, 532, 535 (7th Cir. 2006); see also *Tindall* v. *Poultney High Sch. Dist.*, 414 F.3d 281, 284-286 (2d Cir. 2005); *Navin* v. *Park Ridge Sch. Dist. 64*, 270 F.3d 1147, 1149 (7th Cir. 2001). The Eleventh Circuit has similarly held that parents may not proceed *pro se* when bringing civil actions on behalf of their children under IDEA, but may prosecute their "own case" *pro se* under IDEA "in appropriate circumstances." *Devine* v. *Indian River County Sch. Bd.*, 121 F.3d 576, 581-582 & n.17 (11th Cir. 1997), cert. denied, 522 U.S. 1110 (1998). But while holding that parents cannot pursue their children's claims *pro se*, none of those decisions analyzes whether the right to a free appropriate public education is a substantive right granted to parents as well as children under IDEA. Instead, each decision appears to assume that any substantive IDEA claims were brought by parents acting as guardians or next friends to pursue their children's substantive statutory rights.

[5] See, *e.g.*, *Russell* v. *Department of Educ.*, No. 04-15482, 2006 WL 1876898, at *1 (9th Cir. June 29, 2006); *Montclair Bd. of Educ.* v. *M.W.D.*, No. 05-4536, 2006 WL 1524989, at *3 & n.3 (3d Cir. June 5, 2006); *Mosely*, 434 F.3d at 532, 535; *Tindall*, 414 F.3d at 284-286; *Cavanaugh*, 409 F.3d at 756; *Fauconier* v. *Committee on Special Educ.*, 112 Fed. Appx. 85, 86 (2d Cir. 2004); *Maroni*, 346 F.3d at 250; *Carpenter* v. *Children & Youth Servs.*, 64 Fed. Appx. 850 (3d Cir.) (Table), cert. denied, 540 U.S. 819 (2003); *Murphy* v. *Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 197, 201 (2d Cir. 2002); *Navin*, 270 F.3d at 1149; *Snyder* v. *New York State Educ. Dep't*, 11 Fed. Appx. 38, 40 (2d Cir. 2001); *Collinsgru*, 161 F.3d at 232; *Wenger*, 146 F.3d at 124-126; *Shevtsov* v. *Los Angeles Unified Sch. Dist.*, 134 F.3d 379 (9th Cir. 1998) (Table); *Devine*, 121 F.3d at 581-582 & n.17; *D.K. ex rel. Kumetz-Coleman* v. *Huntington Beach Union High Sch. Dist.*, 428 F. Supp. 2d 1088, 1090-1093 (C.D. Cal. 2006); *C.O.* v. *Portland Pub. Schs.*, 406 F. Supp. 2d 1157, 1168-1169 (D. Or. 2005); *Hammer* v. *Department of Educ.*, 85 F. Supp. 2d 191, 192-193 (E.D.N.Y. 2000).

Schaffer v. *Weast*, 126 S. Ct. 528, 535 (2005). The question is also important. The ability of parents to proceed *pro se* in federal court may facilitate the accomplishment of Congress's goals in enacting IDEA.

The posture of this case does not detract from the case for certiorari. Although the decision below allows petitioners to pursue their appeal with counsel, it conclusively rejects their claimed entitlement to pursue that appeal *pro se*. There is no reason to force petitioners to choose between their merits appeal and obtaining timely review of their claim to pursue their case *pro se*. While foregoing the option of pursuing their appeal with paid counsel would render the decision below final, it would also force petitioners to waive their appeal on the merits if this Court ultimately denied certiorari. On the other hand, forcing petitioners to hire counsel risks mooting the appeal and in any event imposes potentially unnecessary costs. The granting of a stay by Justice Stevens eliminated petitioners' dilemma tem-porarily, and it would make little sense to reimpose the dilemma because of finality concerns when it is clear that the decision below categorically rejects petitioners' claim to proceed *pro se*.

Nor do the 2004 amendments to IDEA provide a basis for postponing review of the question presented. As explained below, if anything, the 2004 amendments only reaffirm that Congress intended to permit parents to proceed *pro se* in IDEA actions. See pp. 15-16, *infra*. Nonetheless, the Sixth Circuit issued its order in this case after the 2004 amendments took effect. Accordingly, the 2004 amendments are unlikely to lead to an elimination of the split in circuit authority. Moreover, this Court has not seen the 2004 amendments as an obstacle to plenary review in its other recent decisions addressing IDEA. See *Schaffer*, *supra*; *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455 (2006).

B. The Sixth Circuit's Limitation On The Ability Of Parents To Appear *Pro Se* In Civil Actions Under IDEA Is Inconsistent With The Terms, Structure, And Purposes Of The Act

Parents are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) when they bring a civil action either to enforce procedural rights under IDEA or to seek relief for a substantive violation of the statutory right to a free appropriate public education. Consequently, parents are parties in their own right in IDEA actions, not merely guardians of their children's rights, and therefore have a right under 28 U.S.C. 1654 to proceed *pro se* on such IDEA claims.

1. In providing a right to bring a civil action under IDEA, Congress used the broad phrase "[a]ny party aggrieved" to define those who are entitled to bring a civil action under 20 U.S.C. 1415(i)(2)(A). As this Court has explained, "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly." *FEC* v. *Akins*, 524 U.S. 11, 19 (1998). A person is "aggrieved" if he or she has "legal rights that are adversely affected" or has "been harmed by an infringement of legal rights." *Black's Law Dictionary* 73 (8th ed. 2004).

It is uncontested that parents have the right to bring both procedural and substantive claims under IDEA at the administrative hearing stage (and to appear *pro se* to prosecute those claims, see 20 U.S.C. 1415(h)(2)). Indeed, Congress specifically contemplated that *parents* typically would be the parties that file administrative complaints. See, *e.g.*, 20 U.S.C. 1415(b)(6) and (b)(8). Having expressly made parents the "party" in interest in administrative hearings under the Act, it follows that Congress also had parents in mind in providing a right to initiate a civil action to "[a]ny party aggrieved by the findings and decision" made in the administrative proceedings. As the First Circuit explained in *Maroni*, "[b]ecause the statute enables parents to request due process hearings, they are parties to such hearings and thus are logically within the group of 'parties aggrieved' given the right to sue." 346 F.3d at 251; see *Collinsgru*, 161 F.3d

at 236-239 (Roth, J., dissenting). Indeed, in granting "any party aggrieved" by the administrative decision the right to file a civil action, Congress made express reference to the administrative complaint. See 20 U.S.C. 1415(i)(2)(A) ("Any party aggrieved * * * shall have the right to bring a civil action with respect to the complaint presented pursuant to this section.").

Moreover, Congress used precisely the same language in providing that "any party aggrieved by the findings and decision" rendered in a hearing conducted by a local educational agency "may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). Parents—as the principal parties initiating due process hearings under the Act—are unquestionably "part[ies] aggrieved" for purposes of filing an administrative appeal. Congress's use of the same broad reference to "any party aggrieved" in the provision governing administrative appeals is persuasive evidence that Congress intended to permit parents to file their own civil actions challenging the outcome of administrative proceedings as well. See *NASA* v. *Federal Labor Relations Auth.*, 527 U.S. 229, 235 (1999) (observing that phrase "should ordinarily retain the same meaning wherever used in the same statute"). Nor is there any practical reason why Congress would permit parents to litigate administrative proceedings under IDEA but not federal court actions.

2. IDEA conveys rights on parents themselves that are not merely derivative of the rights guaranteed for their children. Contrary to the holding of the court of appeals below, parents have procedural rights under IDEA and jointly share with their child the substantive statutory right to a free appropriate public education. See *Collinsgru*, 161 F.3d at 237 (Roth, J., dissenting) (parents' and children's rights under IDEA are "overlapping and inseparable"). When any of those rights is violated, the parents themselves are aggrieved parties.

a. Parents enjoy several procedural rights under IDEA. See *Schaffer*, 126 S. Ct. at 532 (noting several examples). IDEA

requires state and local educational agencies receiving federal funds under the statute "to ensure that children with disabilities and their *parents* are guaranteed procedural safeguards with respect to the provision of [a] free appropriate public education." 20 U.S.C. 1415(a) (emphasis added). Those procedural safeguards include, for example, the right of parents to be members of the team that develops their child's IEP, 20 U.S.C. 1414(d)(1)(B); to examine any records relating to their child; to obtain an "independent educational evaluation of the child"; and to participate in meetings that address the evaluation and educational placement of their child, 20 U.S.C. 1415(b)(1). In addition, parents have the right to receive notice whenever the local school district changes or refuses to change the child's educational placement. 20 U.S.C. 1415(b)(3).[6]

b. Parents of a child with a disability also have a substantive right under IDEA to a *free* appropriate public education for their child. The language of IDEA confirms that Congress viewed the right to a free appropriate public education as one held jointly by parents and their child. For example, in enacting IDEA, Congress found that, "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, [IDEA] has been successful in ensuring children with disabilities and *the families of such children access to a free appropriate public education.*" 20 U.S.C. 1400(c)(3) (emphasis added). Congress similarly recognized that denial of a free appropriate public education adversely affects not just the child with a disability but also his or her family. See 20 U.S.C. 1400(c)(2)(E) (2000) (before IDEA, "*families* were often forced to find services

[6] Where parents allege procedural violations at a due process hearing, the hearing officer may conclude that procedural inadequacies constituted a denial of the substantive guarantee of a free appropriate public education if he determines that the parents' opportunity to participate in the decision-making process was significantly impeded. 20 U.S.C. 1415(f)(3)(E)(ii).

outside the public school system, often at great distance from their residence and at their own expense") (emphasis added).[7]

Other provisions of the Act likewise emphasize that parents ought not be required to bear the cost of educating their child with a disability. For example, the Act defines "free appropriate public education" to mean "special education and related services" that, among other things, are provided "at public expense" and "without charge," 20 U.S.C. 1401(9), and "special education" to mean "specially designed instruction, *at no cost to parents*, to meet the unique needs of a child with a disability," 20 U.S.C. 1401(29) (emphasis added); see also 20 U.S.C. 1412(a)(10)(B)(i) (requiring, under certain circumstances, that children with disabilities placed in private schools by public agencies be "provided special education and related services, in accordance with an [IEP], *at no cost to their parents*") (emphasis added).

To protect the right to a free appropriate public education, Congress authorized courts, under certain circumstances, to order local educational agencies "to reimburse the parents" for private school tuition. 20 U.S.C. 1412(a)(10)(C)(ii); see *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7 (1993) (discussing courts' authority under IDEA to order reimbursement to parents). Such reimbursement was one of the forms of relief that petitioners sought in their federal court complaint. See p. 3, *supra*. The statute's authorization of reimbursement *to parents* confirms that Congress viewed parents as real parties in interest when they challenge the denial of a free appropriate public education. Indeed, the child himself would typically not have standing to seek reimbursement of private school expenses

---

[7] As amended in 2004, the provision now states that

> Before the date of enactment of the Education for All Handicapped Children Act of 1975 * * *, the educational needs of millions of children with disabilities were not being fully met because * * * a lack of adequate resources within the public school system forced *families* to find services outside the public school system.

20 U.S.C. 1400(c)(2)(D) (emphasis added).

under IDEA because he does not suffer any out-of-pocket loss as a result of attending private school. See *Emery* v. *Roanoke City Sch. Bd.*, 432 F.3d 294, 299-300 (4th Cir. 2005) ("In the usual case, the parents of the disabled child will be the appropriate ones to seek reimbursement because they will have incurred the expense and suffered the subsequent monetary injury.").

c. The attorneys' fee provisions of IDEA also confirm that Congress viewed parents as real parties in interest who may pursue their own substantive and procedural claims in court. IDEA prohibits a court from awarding attorneys' fees in "any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent" if, in addition to other conditions, "the relief finally obtained *by the parents* is not more favorable *to the parents* than the offer of settlement." 20 U.S.C. 1415(i)(3)(D)(i) and (D)(i)(III) (emphasis added). If the child were the only real party in interest, it would be strange for Congress to focus so specifically on the relief obtained "by the parents." *Ibid.*[8] Indeed, the attorneys' fees provision specifically contemplates that a parent may be a "prevailing party" in an IDEA action. 20 U.S.C. 1415(i)(3)(E) (authorizing an attorneys' fee award to "a parent *who is the prevailing party* and who was substantially justified in rejecting the settlement offer") (emphasis added).[9]

---

[8] While Congress presumably assumed that parents would oversee litigation involving the rights of their children and so might be the target of settlement offers in that context, the repeated focus on the rights of the parents, here and throughout the statute, indicates that the parents enjoy more than merely derivative rights.

[9] The statutory language cited above appears in both the pre- and post-2004 versions of the statute. The pre-2004 version of the statute also authorized the award of attorneys' fees "to the parents of a child with a disability who is the prevailing party." 20 U.S.C. 1415(i)(3)(B) (2000). That provision, however, does not affect the other provision recognizing that parents may be a prevailing party, because the fact is that either parents or children, or both, may be prevailing parties under IDEA. In any event, in 2004, Congress amended Section 1415(i)(3)(B) to provide for attorneys' fees "to the prevailing party who is the parent of a child with a disability." 20 U.S.C. 1415(i)(3)(B)(i)(I).

d. The 2004 amendments to IDEA reaffirm that parents are real parties in interest when they pursue IDEA claims in court. As amended in 2004, the statute authorizes an award of attorneys' fees

> (I) to a *prevailing party who is the parent* of a child with a disability;
>
> (II) to a prevailing party who is a State educational agency or local educational agency against the *attorney of a parent* who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the *attorney of a parent* who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
>
> (III) to a prevailing State educational agency or local educational agency against *the attorney of a parent*, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

20 U.S.C. 1415(i)(3)(B)(i) (emphasis added). In addition, with limited exceptions, the current version of IDEA mandates that a court reduce the amount of attorneys' fees if:

> (i) the parent, or the *parent's attorney*, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy; [or]
>
> * * * * *
>
> (iv) the *attorney representing the parent* did not provide to the local educational agency the appropriate information in the notice of the [administrative] complaint.

20 U.S.C. 1415(i)(3)(F) (emphasis added). Those provisions reflect Congress's understanding that parents are real parties in interest in IDEA litigation.[10]

3. In support of the court of appeals' decision, respondent relies heavily on congressional inaction—namely, the fact that Congress did not adopt a proposed amendment that would have authorized parents to proceed *pro se* on behalf of their children in IDEA lawsuits. See Br. in Opp. 5-6, 14-15. In May 2004, the Senate passed a bill that would have amended 20 U.S.C. 1415(i) to provide that "a parent of a child with a disability may represent the child in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004). The Conference Committee —without explanation—omitted this provision from the final

[10] Although the Court need not decide which version of the statute applies here, the 2004 amendments govern petitioners' case with respect to the question presented. Those amendments took effect on July 1, 2005, see Pub. L. No. 108-446, § 302(a)(1), 118 Stat. 2803, before the filing of petitioners' merits appeal to the Sixth Circuit. Thus, the statute as amended in 2004 was the version in effect at the time of the proceedings in the court of appeals. Contrast *Schaffer*, 126 S. Ct. at 532 (applying pre-2004 version of IDEA because that version "was in effect during the proceedings below"). There was no reason not to give that provision immediate effect in pending cases. Under *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994), a statute operates retroactively only if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid.* *Respondent* surely cannot claim any of its interests are implicated. The opposing party would hardly seem to have a vested interest in precluding the other party from proceeding *pro se*. Nor is applying this rule to pending cases a retroactive application at all, because the relevant event for judging retroactivity is the ongoing self-representation prospectively. See *id.* at 290-293 (Scalia, J., concurring); cf. *Martin* v. *Hadix*, 527 U.S. 343, 360-361 (1999) (applying attorneys' fees limitations of PLRA in pending cases to legal services provided after effective date of the Act). Thus, applying the 2004 amendments is consistent with *Landgraf*. In any event, the 2004 amendments did not change the law with respect to *pro se* representation because, for the reasons explained above, parents enjoyed the right to proceed *pro se* in federal court under the version of IDEA prior to 2004.

version of the IDEA amendments that Congress enacted in 2004. See H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. 220 (2004).

This failed amendment "lacks persuasive significance." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). As this Court has emphasized, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Ibid.* (citation omitted). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Ibid.* (citation omitted). At any rate, even if the failed Senate amendment were relevant to whether parents may proceed *pro se* on behalf of their children, it does not undermine the conclusion that parents may represent *themselves* in federal court on their *own* substantive and procedural IDEA claims. Indeed, one plausible inference is that Congress ultimately concluded that the Senate amendment was unnecessary because other provisions of IDEA confirm that parents are real parties in interest entitled to pursue their own substantive and procedural IDEA claims in court, and 28 U.S.C. 1654 already provides that such parties may proceed *pro se*. See pp. 15-16, *supra*.

4. Respondent also relies on the canon of *expressio unius est exclusio alterius*, pointing out that although IDEA contains a provision allowing parties to proceed in an administrative hearing without an attorney, see 20 U.S.C. 1415(h),[11] the statute contains no comparable provision pertaining to court actions. See Br. in Opp. 11-12. The *expressio unius* canon has limited

---

[11] "Any party to [an administrative] hearing * * * shall be accorded * * * the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," and "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. 1415(h). These procedural rights apply to "all parties," *Schaffer*, 126 S. Ct. at 532, including local educational agencies.

force, see *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003), and thus cannot overcome the persuasive textual evidence discussed above. In any event, the omission, in fact, reveals nothing about whether Congress intended to authorize parents to proceed *pro se* in federal court. Congress had no need to address the issue in IDEA because—unlike the situation with respect to administrative proceedings—another federal statute (28 U.S.C. 1654) already provided parties the right to pursue their own claims *pro se* in federal lawsuits.

5. Respondent argues (Br. in Opp. 15-16), as a policy matter, that permitting non-attorney parents to proceed *pro se* may increase the number of meritless IDEA lawsuits and thereby burden school districts and divert scarce resources from the education of children with disabilities. Such policy concerns, however, are for Congress, and not the courts. Congress may have determined that prohibiting parents from proceeding *pro se* would have even greater countervailing costs because it could deny some individuals who have meritorious IDEA claims their day in court. Moreover, Congress is sensitive to the costs imposed by IDEA litigation and has amended the statute to address those costs. In that regard, the 2004 amendments to IDEA may reduce the risk that *pro se* lawsuits will unduly burden school districts. As amended in 2004, IDEA expressly allows States and local school districts to recover attorneys' fees from a parent "if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. 1415(i)(3)(B)(i)(III). This provision may serve as a check on meritless *pro se* lawsuits or possibly defray some of the costs. If this provision proves to be an inadequate deterrent to frivolous IDEA lawsuits, Congress can further amend the statute to address the problem.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WAN J. KIM
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

DAVID K. FLYNN
GREGORY B. FRIEL
Attorneys

KENT D. TALBERT
General Counsel
Department of Education

SEPTEMBER 2006

963 A

(8)

SUPREME COURT, U.S.
FILED
DEC 15 2006
OFFICE OF THE CLERK

No. 05-983

In the Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL., PETITIONERS

v.

PARMA CITY SCHOOL DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record

WAN J. KIM
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

DAVID K. FLYNN
GREGORY B. FRIEL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KENT D. TALBERT
General Counsel
Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

To what extent, if any, may a non-lawyer parent of a minor child with a disability proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 6
Argument:
Parents may proceed *pro se* in federal court when they bring a civil action under IDEA 9
A. 28 U.S.C. 1654 entitles parents to proceed pro se in federal court on IDEA claims if they qualify as "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(a) 9
B. Parents are "part[ies] aggrieved" under Section 1415(i)(2)(a) when they pursue either procedural or substantive claims under IDEA ... 11
C. Because procedural and substantive claims under IDEA are inextricably intertwined, the Act should not be interpreted to allow parents to proceed *pro se* to enforce procedural, but not substantive, rights 25
D. Policy concerns about the burdens of meritless litigation do not justify adopting an interpretation of IDEA at odds with its plain language and structure 27
Conclusion 29

TABLE OF AUTHORITIES

Cases:

Adam J. v. *Keller Indep. Sch. Dist.*, 328 F.3d 804 (5th Cir. 2003) 27
Arlington Cent. Sch. Dist. v. *Murphy*, 126 S. Ct. 2455 (2006) 1, 11, 19

Cases–Continued: Page

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 24
Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 2, 15, 25
Buckhannon Bd. & Care Home, Inc. v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001) 28
Cavanaugh v. *Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005) 5, 6
Cedar Rapids Cmty. Sch. Dist. v. *Garrett F.*, 526 U.S. 66 (1999) 1
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 23
Cheung v. *Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2d Cir. 1990) 11
Collinsgru v. *Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998) 8, 11, 13, 25, 28
DiBuo v. *Board of Educ.*, 309 F.3d 108 (4th Cir. 2002) 27
Emery v. *Roanoke City Sch. Bd.*, 432 F.3d 294 (4th Cir. 2005) 18
FEC v. *Akins*, 524 U.S. 11 (1998) 12
Florence County Sch. Dist. Four v. *Carter*, 510 U.S. 7 (1993) 17
Honig v. *Doe*, 484 U.S. 305 (1988) 10
Kingsmore v. *District of Columbia*, 466 F.3d 118 (D.C. Cir. 2006) 8, 26
Knable v. *Bexley City Sch. Dist.*, 238 F.3d 755 (6th Cir.), cert. denied, 533 U.S. 950 (2001) 27
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 22

Cases–Continued: Page

Lesesne v. *District of Columbia*, 447 F.3d 828 (D.C. Cir. 2006) 27
Maroni v. *Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003) 13, 25, 27, 28
Martin v. *Hadix*, 527 U.S. 343 (1999) 22
Meeker v. *Kercher*, 782 F.2d 153 (10th Cir. 1986) 11
Morgan v. *Potter*, 157 U.S. 195 (1895) 11
Myers v. *Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005) 11
Nack v. *Orange City Sch. Dist.*, 454 F.3d 604 (6th Cir. 2006) 27
NASA v. *Federal Labor Relations Auth.*, 527 U.S. 229 (1999) 14
Schaffer v. *Weast*, 126 S. Ct. 528 (2005) 1, 2, 14, 19, 22, 24
School Bd. of Collier County v. *K.C.*, 285 F.3d 977 (11th Cir. 2002) 27
School Comm. of Burlington v. *Department of Educ.*, 471 U.S. 359 (1985) 10, 18
T.S. v. *Independent Sch. Dist. No. 54*, 265 F.3d 1090 (10th Cir. 2001), cert. denied, 535 U.S. 927 (2002) 27
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 11

Constitution, statutes and rule:

U.S. Const. Art. I, § 8, Cl. 1 11
Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 10
§ 1, 104 Stat 1103 10

Statutes and rule–Continued: Page

§ 901(a)(1), 104 Stat. 1141 10
Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* 1, 2
20 U.S.C. 1400(c)(2)(E) (2000) 16
20 U.S.C. 1415(b)(6) (2000) 10
20 U.S.C. 1415(b)(7) (2000) 10, 21
20 U.S.C. 1415(i)(3)(B) (2000) 19, 21
20 U.S.C. 1415(i)(3)(E) (2000) 21
20 U.S.C. 1415(i)(3)(F)(iv) (2000) 21
Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (to be codified at 20 U.S.C. 1400 *et seq.*) 2
20 U.S.C. 1400(c)(2)(D) 17
20 U.S.C. 1400(c)(3) 2, 7, 16
20 U.S.C. 1400(d)(1)(A) 2
20 U.S.C. 1400(d)(1)(B) 2
20 U.S.C. 1400 note (§ 302(a)(I), 118 Stat. 2803) ... 22
20 U.S.C. 1401(9) 7, 17
20 U.S.C. 1401(29) 8, 17
20 U.S.C. 1412(a)(1)(A) 2
20 U.S.C. 1412(a)(4) 2
20 U.S.C. 1412(a)(6) 14
20 U.S.C. 1412(a)(10)(B)(i) 8, 17
20 U.S.C. 1412(a)(10)(C)(ii) 8, 17
20 U.S.C. 1414(d) 2
20 U.S.C. 1414(d)(1)(B) 2, 14
20 U.S.C. 1414(d)(3)(A)(ii) 3
20 U.S.C. 1414(e) 14

Statutes and rule–Continued: Page

20 U.S.C. 1415(a) 14
20 U.S.C. 1415(a)-(d) 16
20 U.S.C. 1415(b)(1) 15
20 U.S.C. 1415(b)(3) 15
20 U.S.C. 1415(b)(6) 12
20 U.S.C. 1415(b)(6)(A) 3
20 U.S.C. 1415(b)(7) 21
20 U.S.C. 1415(b)(8) 12
20 U.S.C. 1415(f)(1)(A) 3
20 U.S.C. 1415(f)(1)(B)(i) 13
20 U.S.C. 1415(f)(3)(E)(i) 15, 26
20 U.S.C. 1415(f)(3)(E)(ii) 8, 15, 26
20 U.S.C. 1415(g)(1) 3, 7, 13
20 U.S.C. 1415(h) 24
20 U.S.C. 1415(h)(2) 12
20 U.S.C. 1415(i) 23
20 U.S.C. 1415(i)(2) 4
20 U.S.C. 1415(i)(2)(A) ..... *passim*
20 U.S.C. 1415(i)(3)(B) 8, 21
20 U.S.C. 1415(i)(3)(B)(i) 20
20 U.S.C. 1415(i)(3)(B)(i)(I) 19, 20
20 U.S.C. 1415(i)(3)(B)(i)(III) 21, 29
20 U.S.C. 1415(i)(3)(D) 8
20 U.S.C. 1415(i)(3)(D)(i) 18
20 U.S.C. 1415(i)(3)(D)(i)(III) 18, 19
20 U.S.C. 1415(i)(3)(E) 8, 19
20 U.S.C. 1415(i)(3)(F) 8, 20, 21

Statutes and rule–Continued: Page

20 U.S.C. 1415(j) 4
20 U.S.C. 1415(k)(1)(H) 15
20 U.S.C. 1415(k)(3)(A) 3
20 U.S.C. 1415(*o*) 12
Prison Litigation reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 22
28 U.S.C. 1654 ..... 7, 9, 11, 24
Ohio Rev. Code Ann. § 3109.01 18
Fed. R. Civ. P. 17(c) 10, 11

Miscellaneous:

Black's Law Dictionary (8th ed. 2004) 12
150 Cong. Rec. S5430 (daily ed. May 13, 2004) 23
H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. (2004) 23, 26

In the Supreme Court of the United States

No. 05-983

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL., PETITIONERS

v.

PARMA CITY SCHOOL DISTRICT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question whether and to what extent a non-lawyer parent of a minor child with a disability may proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.* The Department of Education administers IDEA and has authority to promulgate regulations necessary to ensure compliance with the Act. See 20 U.S.C. 1406. The United States has participated as an amicus in numerous cases involving the construction of IDEA. See, *e.g.*, *Arlington Cent. Sch. Dist.* v. *Murphy*, 126 S. Ct. 2455 (2006); *Schaffer* v. *Weast*, 126 S. Ct. 528 (2005); *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F.*, 526 U.S. 66 (1999);

Board of Educ. v. *Rowley*, 458 U.S. 176 (1982). At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, provides federal grants to States for assistance in the education of children with disabilities.[1] The Act explicitly seeks to protect the rights of parents as well as children. See 20 U.S.C. 1400(d)(1)(B) (IDEA seeks "to ensure that the rights of children with disabilities and parents of such children are protected."). Under IDEA, a State participating in the grant program must ensure that each child with a disability receives a "free appropriate public education," which includes special education and related services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). The Act guarantees "children with disabilities *and the families of such children* access to a free appropriate public education." 20 U.S.C. 1400(c)(3) (emphasis added).

IDEA requires local school systems to develop an individualized education program (IEP) for each child with a disability. See 20 U.S.C. 1412(a)(4), 1414(d). "Parents and guardians play a significant role in the IEP process." *Schaffer* v. *Weast*, 126 S. Ct. 528, 532 (2005). For example, parents are members of the "IEP team" that develops an IEP for their child. 20 U.S.C. 1414(d)(1)(B). In addition, in developing the IEP, the team must consider, among other factors, "the concerns

---

[1] Congress reauthorized and amended IDEA in 2004. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (to be codified at 20 U.S.C. 1400 *et seq.*). Unless otherwise indicated, citations are to the statute as amended in 2004.

of the parents for enhancing the education of their child." 20 U.S.C. 1414(d)(3)(A)(ii).

Parents may file an administrative complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the[ir] child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6)(A). Parents are likewise entitled to "an impartial due process hearing" on their complaint before either the local or state educational agency. 20 U.S.C. 1415(f)(1)(A). In addition, the statute gives parents a right to such a hearing when they disagree with certain decisions by the local education agency pertaining to the child's violation of a code of student conduct. 20 U.S.C. 1415(k)(3)(A); 20 U.S.C. 1415(f)(1)(A). If the local agency conducts the due process hearing, "any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). After exhausting administrative remedies, "[a]ny party aggrieved by the findings and decision" made in the administrative proceedings has "the right to bring a civil action * * * in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. 1415(i)(2)(A).

2. Petitioners are Jeff and Sandee Winkelman and their son, Jacob, who has autism spectrum disorder. Pet. 1-2. The respondent school district proposed an IEP for the 2003-2004 school year that would have placed Jacob at a public elementary school. Pet. App. 4a-5a. Jacob's parents believed the proposed IEP was inadequate and requested a due process hearing in which they alleged that respondent had failed to provide a free appropriate public education for their son. *Ibid.*

An administrative hearing officer issued an order designating the learning center where Jacob had attended preschool as his "stay put" placement under 20 U.S.C. 1415(j) during the pendency of the administrative proceedings. Pet. App. 4a-5a. Instead of sending Jacob to the learning center for the 2003-2004 school year, petitioners enrolled him at their own expense at the Monarch School, a private school that specializes in educating children with autism. *Id.* at 5a.

In February 2004, the administrative hearing officer issued a decision finding that respondent had provided Jacob with a free appropriate public education as required by IDEA. J.A. 21-113; Pet. App. 6a. Petitioners appealed that decision to a state-level review officer, who affirmed the hearing officer's decision. J.A. 114-158; Pet. App. 6a.

3. On July 15, 2004, petitioners filed an action in federal court pursuant to 20 U.S.C. 1415(i)(2), challenging the administrative decision rejecting their IDEA claims. Pet. App. 6a; J.A. 11-20. The complaint listed three plaintiffs: Jacob's parents and Jacob "by and through" his parents. J.A. 11-12. Petitioners alleged that respondent violated both IDEA's procedural requirements and its substantive guarantee by failing to provide Jacob a free appropriate public education. J.A.17; see Pet. App. 10a-22a. Petitioners sought, *inter alia*, reimbursement for the cost of educating Jacob at the Monarch School. J.A. 19; Pet. App. 6a. Petitioners later sought a preliminary injunction designating the Monarch School as Jacob's stay-put placement, but the district court denied the request. See *Winkelman* v. *Parma City Sch. Dist.*, 166 Fed. Appx. 807, 808-809 (6th Cir. 2006). On June 2, 2005, the district court rejected all of petitioners' IDEA

claims and granted judgment in favor of respondent. Pet. App. 3a-23a.

4. Petitioners filed two *pro se* appeals. The first appeal challenged the district court's denial of a preliminary injunction regarding Jacob's stay-put placement at the learning center he had attended. See No. 04-4159 (6th Cir.). On September 20, 2005, the Sixth Circuit ordered dismissal of that appeal unless petitioners retained counsel within 30 days. Resp. Br. in Opp. App. 2b-4b (Resp. App.). The court relied on its decision in *Cavanaugh* v. *Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), which held that IDEA does not grant parents the right to represent their child *pro se* in federal court and that "parents cannot pursue their own substantive IDEA claim *pro se*." Resp. App. 3b (citing *Cavanaugh*, 409 F.3d at 756-757). In response to the Sixth Circuit's order, petitioners retained counsel. *Id.* at 5b-7b. On January 25, 2006, the Sixth Circuit affirmed the denial of the preliminary injunction. See *Winkelman*, 166 Fed. Appx. at 808-811.

Petitioners also filed a *pro se* appeal from the district court's merits decision. See No. 05-3886 (6th Cir.). On November 4, 2005, the court of appeals ordered dismissal of that appeal unless petitioners retained counsel within 30 days. Pet. App. 1a-2a. Relying on its order in petitioners' preliminary injunction appeal, the Sixth Circuit stated that "Jeff and Sandee Winkelman are not permitted to represent their child in this court nor can they pursue their own IDEA claim *pro se*." *Id.* at 2a. Petitioners are challenging that order in this Court.

The Sixth Circuit's holding appears to prohibit parents from proceeding *pro se* not only on substantive claims under IDEA, but also on procedural claims. Although recognizing that parents have procedural rights

under IDEA, the court in *Cavanaugh* stated that those "procedural rights exist only to ensure that the child's substantive right to a [free appropriate public education] is protected." 409 F.3d at 757. The court therefore concluded that "any right on which the [parents] could proceed on their own behalf would be derivative of their son's right to receive a [free appropriate public education], and wholly dependent upon the [parents'] proceeding, through counsel, with their appeal on [their son's] behalf." *Ibid.* The Sixth Circuit applied its reasoning in *Cavanaugh* to preclude petitioners from appearing *pro se* on both their substantive and procedural IDEA claims in this case. Pet. App. 2a; Resp. App. 4b (requiring dismissal of entire appeal).

5. On December 2, 2005, Justice Stevens issued a stay of the Sixth Circuit's order of November 4, 2005, pending the timely filing and disposition by this Court of a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Under a correct reading of IDEA, the parents of a child with a disability may proceed *pro se* when they bring a civil action in federal court either to enforce procedural rights under the statute or to seek relief for a substantive violation of the right to a free appropriate public education.

A. This case turns on whether parents may be "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A). IDEA provides that "[a]ny party aggrieved by the findings and decision" made in a due process hearing or administrative appeal under the statute may bring a civil action in state or federal court. *Ibid.* If parents are "part[ies] aggrieved" for purposes of Section 1415(i)(2)(A), then they have a right to proceed *pro se* if

they wish under 28 U.S.C. 1654, which provides that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." 28 U.S.C. 1654 (emphasis added).

B. IDEA's text and structure demonstrate that parents are "part[ies] aggrieved" under Section 1415(i)(2)(A) when they bring a civil action to enforce either procedural or substantive rights under the statute. It is undisputed that parents are "part[ies] aggrieved" under 20 U.S.C. 1415(g)(1), which authorizes *administrative* appeals from adverse decisions rendered in due process hearings. It follows logically that Congress had parents in mind when it authorized a civil action by "[a]ny party aggrieved by the findings and decision" made in those administrative hearings. 20 U.S.C. 1415(i)(2)(A). Under well-established principles of statutory construction, the Court should interpret the phrase "[a]ny party aggrieved" to have the same meaning in Section 1415(i)(2)(A) as it does under Section 1415(g)(1).

Moreover, parents themselves enjoy several rights under IDEA that are not merely derivative of the rights guaranteed for their children. When any of those rights is violated, the parents themselves are aggrieved parties. In addition to enjoying numerous procedural safeguards under IDEA, parents share with their child the substantive right under the statute to a free appropriate public education. For example, Congress found that IDEA "has been successful in ensuring children with disabilities and *the families of such children access to a free appropriate public education*." 20 U.S.C. 1400(c)(3) (emphasis added). Other statutory provisions emphasize that parents should not be required to bear the cost of educating their child with a disability. 20 U.S.C. 1401(9)

and (29), 1412(a)(10)(B)(i). Indeed, Congress authorized reimbursement of parents under certain circumstances for private school tuition when a local educational agency violates its statutory obligation to provide a free appropriate public education. See 20 U.S.C. 1412(a)(10)(C)(ii).

The attorneys' fees provisions of IDEA further confirm that Congress viewed parents as real parties in interest who may pursue their own procedural and substantive claims in court. See 20 U.S.C. 1415(i)(3)(D) and (E). Those provisions specifically identify the "parents" as the "prevailing party." The 2004 amendments to IDEA reaffirmed that parents are real parties in interest when they bring civil actions under IDEA. See 20 U.S.C. 1415(i)(3)(B) and (F).

C. The parents' right to proceed *pro se* in IDEA actions should not depend on whether their claims are deemed procedural, as opposed to substantive, in nature. One court of appeals has held that parents may litigate their own procedural IDEA claims *pro se*, but are barred from proceeding without an attorney when bringing claims challenging the denial of the substantive right to a free appropriate public education. See *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 227, 230-236 (3d Cir. 1998). That approach not only conflicts with congressional intent but also is unworkable in practice because procedural and substantive rights under IDEA are inextricably intertwined. In order to obtain relief in the administrative hearing and in federal court, a party who alleges a procedural violation of IDEA typically must demonstrate that the procedural flaw resulted in the denial of the substantive right to a free appropriate public education. See 20 U.S.C. 1415(f)(3)(E)(ii); *Kingsmore* v. *District of Columbia*, 466 F.3d 118 (D.C.

Cir. 2006). Thus, even if the party's claim is deemed "procedural," a court typically will have to resolve the question of whether a substantive violation has occurred.

D. Although permitting parents to proceed *pro se* could increase the amount of meritless IDEA litigation, it is for Congress, not the courts, to decide whether that risk outweighs the harm that would occur if parties with meritorious claims are denied their day in court because they cannot find or afford an attorney. In any event, such policy concerns cannot justify adopting an interpretation of IDEA that is contrary to the plain language and structure of the statute.

ARGUMENT

PARENTS MAY PROCEED *PRO SE* IN FEDERAL COURT WHEN THEY BRING A CIVIL ACTION UNDER IDEA

The Sixth Circuit's holding barring parents from appearing *pro se* in civil actions under IDEA is inconsistent with the plain language, structure, and purposes of the statute. Parents are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) when they bring a civil action either to enforce procedural rights under IDEA or to seek relief for a substantive violation of the statutory right to a free appropriate public education. Consequently, parents are parties in their own right in IDEA actions, not merely guardians of their children's rights, and therefore have a right under 28 U.S.C. 1654 to proceed *pro se* if they wish on their IDEA claims.

A. 28 U.S.C. 1654 Entitles Parents To Proceed Pro Se In Federal Court On IDEA Claims If They Qualify As "Part[ies] Aggrieved" Under 20 U.S.C. 1415(i)(2)(A)

IDEA provides that "[a]ny party aggrieved by the findings and decision" made in a due process hearing or

administrative appeal under the statute may bring a civil action in state or federal court. 20 U.S.C. 1415(i)(2)(A). This Court has recognized that parents are among those who may file a civil action under IDEA. See *Honig* v. *Doe*, 484 U.S. 305, 312 (1988) ("At the conclusion of [a due process] hearing, both the parents and the local educational agency may seek further administrative review and, where that proves unsatisfactory, may file a civil action in any state or federal court."); *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 361 (1985) (noting "the right of the parents * * * to challenge in administrative and court proceedings a proposed IEP with which they disagree").[2] Congress expressly provided that parents may file administrative complaints "with respect to any matter relating to * * * the provision of a free appropriate public education" to their children, and it specifically required that "*the parent* of a child with a disability" shall "provide notice" to the educational agency in the complaint concerning, *inter alia*, "a description of the nature of the problem of the child" under the school's proposed placement and "a proposed resolution of the problem to the extent known and available to *the parents* at the time." 20 U.S.C. 1415(b)(6) and (7) (2000) (emphases added).

This Court has not addressed whether parents are "part[ies] aggrieved" under 20 U.S.C. 1415(i)(2)(A) entitled to sue on their *own* behalf or, instead, whether they may sue only on behalf of their children.[3] That issue is

---

[2] When this Court decided *Doe* and *Burlington*, the statute was known as the Education of the Handicapped Act. Congress changed the name of the statute to IDEA in 1990. See Pub. L. No. 101-476, §§ 1, 901(a)(1), 104 Stat. 1103, 1141.

[3] The parents' right to file an IDEA action could stem, for example, from Rule 17(c) of the Federal Rules of Civil Procedure, which permits

key to the resolution of the question in this case, because Congress has provided that "[i]n all courts of the United States *the parties* may plead and conduct their own cases personally or by counsel." 28 U.S.C. 1654 (emphasis added). Thus, if parents are "part[ies] aggrieved" for purposes of Section 1415(i)(2)(A), then they are entitled under 28 U.S.C. 1654 to proceed *pro se* in a federal court action under IDEA.[4]

B. Parents Are "Part[ies] Aggrieved" Under Section 1415(i)(2)(A) When They Pursue Either Procedural Or Substantive Claims Under IDEA

In providing a right to bring a civil action under IDEA, Congress used the broad phrase "[a]ny party

---

a parent or other guardian to "sue or defend on behalf" of a minor child. If a child is a "party aggrieved" under IDEA, a parent could rely on Rule 17(c) to file an IDEA suit in federal court on the child's behalf. But when a parent sues as "next friend" of his or her minor child, "[i]t is the infant, and not the next friend, who is the real and proper party." *Morgan* v. *Potter*, 157 U.S. 195, 198 (1895); cf. *Whitmore* v. *Arkansas*, 495 U.S. 149, 163 (1990). Thus, when parents sue solely as representatives of their children under Rule 17(c), the parents are not "parties" who are "conduct[ing] their own cases" for purposes of 28 U.S.C. 1654, and they may not represent other individuals, including their children, in court. See, *e.g.*, *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998); *Myers* v. *Loudoun County Pub. Schs.*, 418 F.3d 395, 401 (4th Cir. 2005); *Cheung* v. *Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker* v. *Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (per curiam). As discussed, the parents in this case sought to litigate under IDEA in their own right. See pp. 4-5, *supra*.

[4] The fact that IDEA is Spending Clause legislation, while relevant in other contexts, see, *e.g.*, *Arlington Cent. School Dist. Bd. of Educ.* v. *Murphy*, 126 S. Ct. 2455, 2459 (2006), does not affect the analysis here. It is 20 U.S.C. 1654, rather than any provision of IDEA, that provides parties, including parents, the right to proceed *pro se* in federal court, and 20 U.S.C. 1654 is not Spending Clause legislation.

aggrieved by the findings and decision" of the hearing officer to define those who are entitled to bring a civil action under Section 1415(i)(2)(A). There is no dispute that parents typically are "part[ies]" to the administrative due process hearing. Indeed, the Act expressly identifies parents as parties who are entitled to file administrative complaints. See, *e.g.*, 20 U.S.C. 1415(b)(8), 1415(*o*). Nor can there be any doubt that parents who lose during the administrative process are "aggrieved" within the meaning of Section 1415(i)(2)(A). As this Court has explained, "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly." *FEC* v. *Akins*, 524 U.S. 11, 19 (1998). A person is "aggrieved" if he or she has "legal rights that are adversely affected" or has "been harmed by an infringement of legal rights." *Black's Law Dictionary* 73 (8th ed. 2004). Parents are "aggrieved" when they bring suit seeking relief either for a violation of their own procedural rights under IDEA or for a violation of the substantive right to a free appropriate public education.

1. It is uncontested that parents have the right to bring both procedural and substantive claims under IDEA at the administrative hearing stage (and to appear *pro se* to prosecute those claims, see 20 U.S.C. 1415(h)(2)). See Br. in Opp. 2, 4, 11, 17. Indeed, Congress specifically contemplated that parents typically would be the parties who file administrative complaints. See, *e.g.*, 20 U.S.C. 1415(b)(6), 1415(b)(8), 1415(*o*). The statutory language, moreover, indicates that an administrative complaint filed by parents under IDEA is considered the parents' own complaint and not simply a claim that they are bringing on behalf of their child. IDEA mandates that before the due process hearing takes place, the local education agency must convene a meet-

ing "where the *parents* of the child discuss *their complaint*, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint." 20 U.S.C. 1415(f)(1)(B)(i) (emphasis added). This language confirms that parents are parties in interest in their own right during the administrative proceedings.

Having expressly made parents the "party" in interest in administrative hearings under the Act, it follows that Congress also had parents in mind in providing a right to initiate a civil action to "[a]ny party aggrieved by the findings and decision" made in the administrative proceedings. As the First Circuit has explained, "[b]ecause the statute enables parents to request due process hearings, they are parties to such hearings and thus are logically within the group of 'parties aggrieved' given the right to sue." *Maroni* v. *Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 251 (2003); see *Collinsgru*, 161 F.3d at 237-239 (Roth, J., dissenting). Indeed, in granting "any party aggrieved" by the administrative decision the right to file a civil action, Congress made express reference to the administrative complaint. See 20 U.S.C. 1415(i)(2)(A) ("Any party aggrieved * * * shall have the right to bring a civil action with respect to the complaint presented pursuant to this section.").

Moreover, Congress used precisely the same language in providing that "any party aggrieved by the findings and decision" rendered in a hearing conducted by a local educational agency "may appeal such findings and decision to the State educational agency." 20 U.S.C. 1415(g)(1). Parents—as the principal parties initiating due process hearings under the Act—are unquestionably "part[ies] aggrieved" for purposes of filing an administrative appeal. Congress's use of the same broad refer-

ence to "any party aggrieved" in the provision governing administrative appeals is persuasive evidence that Congress intended to permit parents to file their own civil actions challenging the outcome of administrative proceedings as well. See *NASA* v. *Federal Labor Relations Auth.*, 527 U.S. 229, 235 (1999) (observing that a phrase "should ordinarily retain the same meaning wherever used in the same statute"). Nor is there any practical reason why Congress would permit parents to litigate administrative proceedings on their own behalf under IDEA but not federal court actions.

2. IDEA confers rights on parents themselves that are not merely derivative of the rights guaranteed for their children. Contrary to the holding of the court of appeals below, parents have procedural rights under IDEA and jointly share with their child the substantive statutory right to a free appropriate public education. When any of those rights is violated, the parents themselves are aggrieved parties under the Act.

a. Parents enjoy several procedural rights under IDEA. See *Schaffer* v. *Weast*, 126 S. Ct. 528, 532 (2005) (noting several examples). IDEA requires state and local educational agencies receiving federal funds under the statute "to ensure that children with disabilities *and their parents* are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." 20 U.S.C. 1415(a) (emphasis added); accord 20 U.S.C. 1412(a)(6). Those procedural safeguards include, among other rights, the right to be members of the team that develops their child's IEP, 20 U.S.C. 1414(d)(1)(B); to be included in "any group that makes decisions on the educational placement of their child," 20 U.S.C. 1414(e); to examine any records relating to their child; to obtain an "independent educational evaluation

of the child"; and to participate in meetings that address the evaluation and educational placement of their child, 20 U.S.C. 1415(b)(1). In addition, parents have the right to receive notice whenever the local school system initiates or changes or refuses to initiate or change the child's identification, evaluation, or educational placement, or the provision of a free appropriate public education to the child. 20 U.S.C. 1415(b)(3). Parents are also entitled to notice whenever the local school system decides to take disciplinary action against a child with a disability. 20 U.S.C. 1415(k)(1)(H).

IDEA, moreover, makes clear that the procedural rights guaranteed parents are necessarily intertwined with the substantive right to a free appropriate public education. It directs that administrative hearing officers make decisions "on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. 1415(f)(3)(E)(i). But it expressly provides that, "[i]n matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education" if the procedural inadequacies "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child." 20 U.S.C. 1415(f)(3)(E)(ii). Congress thus recognized that the procedural protections—most of which are expressly guaranteed *to the parents*—are themselves inextricably tied to the substantive guarantee of a free appropriate public education. As this Court observed in *Board of Education* v. *Rowley*, 458 U.S. 176, 205-206 (1982):

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and

> guardians a large measure of participation at every stage of the administrative process, see, *e.g.*, Section 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

b. Parents of a child with a disability also have a substantive right under IDEA to a *free* appropriate public education for their child. The language of IDEA confirms that Congress viewed the right to a free appropriate public education as one held jointly by parents and their child. For example, in enacting IDEA, Congress found that, "[s]ince the enactment and implementation of the Education for All Handicapped Children Act of 1975, [IDEA] has been successful in ensuring children with disabilities and *the families of such children access to a free appropriate public education.*" 20 U.S.C. 1400(c)(3) (emphasis added). Congress similarly recognized (and common sense makes clear) that denial of a free appropriate public education adversely affects not just the child with a disability but also his or her family. See 20 U.S.C. 1400(c)(2)(E) (2000) (before IDEA, "*families* were often forced to find services outside the public school system, often at great distance from their resi-

dence and at their own expense") (emphasis added).[5] Parents typically bear the cost of educating their child if the "free" guarantee is not honored. Thus, while a child suffers a harm by the denial of an appropriate education, the parents are likewise harmed where, as here, the child ultimately receives an appropriate education, but only at significant financial cost to the parents.

Other provisions of the Act further emphasize that parents ought not be required to bear the cost of educating their child with a disability. For example, the Act defines "free appropriate public education" to mean "special education and related services" that, among other things, are provided "at public expense" and "without charge," 20 U.S.C. 1401(9), and it defines "special education" to mean "specially designed instruction, *at no cost to parents*, to meet the unique needs of a child with a disability," 20 U.S.C. 1401(29) (emphasis added); see 20 U.S.C. 1412(a)(10)(B)(i) (requiring, under certain circumstances, that children with disabilities placed in private schools by public agencies be "provided special education and related services, in accordance with an [IEP], *at no cost to their parents*") (emphasis added).

Moreover, Congress authorized courts, under certain circumstances, to order local educational agencies "to reimburse the parents" for private school tuition. 20 U.S.C. 1412(a)(10)(C)(ii); see *Florence County Sch. Dist.*

---

[5] As amended in 2004, the provision now states that

> Before the date of enactment of the Education for All Handicapped Children Act of 1975 * * * , the educational needs of millions of children with disabilities were not being fully met because * * * a lack of adequate resources within the public school system forced *families* to find services outside the public school system.

20 U.S.C. 1400(c)(2)(D) (emphasis added).

Four v. *Carter*, 510 U.S. 7 (1993) (discussing courts' authority under IDEA to order reimbursement to parents); *Burlington*, 471 U.S. at 369 (same). Petitioners sought such reimbursement in their federal court complaint. See pp. 4-5, *supra*. The statute's authorization of reimbursement *to parents* confirms that Congress viewed parents as real parties in interest when they challenge the denial of a free appropriate public education. Indeed, the child himself would typically lack the capacity to contract on his own behalf for private educational services, see, *e.g.*, Ohio Rev. Code Ann. § 3109.01 (LexisNexis 2003) (defining "age of majority" for contracting purposes to be eighteen years), and would lack standing to seek reimbursement of private school expenses under IDEA because the child does not suffer any out-of-pocket loss as a result of attending private school, see *Emery* v. *Roanoke City Sch. Bd.*, 432 F.3d 294, 299-300 (4th Cir. 2005) ("In the usual case, the parents of the disabled child will be the appropriate ones to seek reimbursement because they will have incurred the expense and suffered the subsequent monetary injury.").

c. The attorneys' fees provisions of IDEA also confirm that Congress viewed parents as real parties in interest who may pursue their own substantive and procedural claims in court. IDEA prohibits a court from awarding attorneys' fees in "any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent" if, in addition to other conditions, "the relief finally obtained *by the parents* is not more favorable *to the parents* than the offer of settlement." 20 U.S.C. 1415(i)(3)(D)(i) and (D)(i)(III) (emphasis added). If the child were the only real party in interest, it would be

strange for Congress to focus so specifically on the relief obtained "by the parents" and the extent to which such relief was "favorable to the parents." 20 U.S.C. 1415(i)(3)(D)(i)(III).[6] Indeed, the attorneys' fees provisions specifically identify the *parent* as a "prevailing party" in an IDEA action. 20 U.S.C. 1415(i)(3)(E) (authorizing an attorneys' fees award to "a parent *who is the prevailing party* and who was substantially justified in rejecting the settlement offer") (emphasis added); see *Arlington Cent. Sch. Dist.* v. *Murphy*, 126 S. Ct. 2455, 2460 (2006) (noting authority of courts to award reasonable attorneys' fees in IDEA actions to "prevailing parents"); *Schaffer*, 126 S. Ct. at 532-533 (same).[7] It would be more than passing strange for the statute to classify parents as "prevailing parties," but not "parties aggrieved" under 20 U.S.C. 1415(i)(2)(A).

d. The 2004 amendments to IDEA reaffirm that parents are real parties in interest when they pursue IDEA

---

[6] While Congress presumably assumed that parents would oversee litigation involving the rights of their children and so might be the target of settlement offers in that context, the repeated focus on the rights of the parents, here and throughout the statute, and the classification of parents as the "prevailing party" indicate that the parents' rights are more than merely derivative.

[7] The statutory language cited above appears in both the pre- and post-2004 versions of the statute. The pre-2004 version of the statute also authorized the award of attorneys' fees "to the parents of a child with a disability who is the prevailing party." 20 U.S.C. 1415(i)(3)(B) (2000). That provision, however, does not affect the other provision recognizing that parents may be a prevailing party, because the fact is that either parents or children, or both, may be prevailing parties under IDEA. In any event, in 2004, Congress amended Section 1415(i)(3)(B) to provide for attorneys' fees "to a prevailing party who is the parent of a child with a disability." 20 U.S.C. 1415(i)(3)(B)(i)(I).

claims in court. As amended in 2004, the statute authorizes an award of attorneys' fees.

> (I) to *a prevailing party who is the parent* of a child with a disability;
>
> (II) to a prevailing party who is a State educational agency or local educational agency against the *attorney of a parent* who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the *attorney of a parent* who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
>
> (III) to a prevailing State educational agency or local educational agency against the *attorney of a parent*, or against the *parent*, if the *parent's complaint or subsequent cause of action* was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

20 U.S.C. 1415(i)(3)(B)(i) (emphasis added). In addition, with limited exceptions, the current version of IDEA mandates that a court reduce the amount of attorneys' fees if "the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy." 20 U.S.C. 1415(i)(3)(F). Those provisions reflect Congress's understanding that parents are real parties in interest in IDEA litigation.

The wording of the 2004 amendments is significant in three respects. First, as amended, IDEA refers to the

parent, not the child, as the "prevailing party." 20 U.S.C. 1415(i)(3)(B)(i)(I). Before 2004, the statute referred to both children and parents as prevailing parties. Compare 20 U.S.C. 1415(i)(3)(B) (2000) (authorizing an award of attorneys' fees "to the parents of a child with a disability who is the prevailing party") with 20 U.S.C. 1415(i)(3)(E) (2000) (authorizing an attorneys' fees award to "a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer"). The 2004 amendments, however, omitted any reference to the child as a prevailing party. This omission bolsters the conclusion that Congress viewed parents as real parties in interest when they pursue IDEA claims in court.

Second, although IDEA repeatedly refers to the "attorney of a parent," the "parent's attorney" or the "attorney representing the parent," 20 U.S.C. 1415(i)(3)(B) and (F), the current version of the statute never mentions the *child's* attorney. Before the 2004 amendments, the statute referred both to "the attorney representing the parent," 20 U.S.C. 1415(i)(3)(F)(iv) (2000), and "the attorney representing the child." 20 U.S.C. 1415(b)(7) (2000). The 2004 amendments, however, deleted the phrase "the attorney representing the child" and replaced it with "the attorney representing a party." 20 U.S.C. 1415(b)(7). It is unlikely that the 2004 amendments would have omitted a reference to the *child's* attorney while including multiple references to the *parent's* attorney, if Congress viewed the child as the only interested party in a civil action under IDEA.

Finally, by referring to "the parent's complaint *or subsequent cause of action*," 20 U.S.C. 1415(i)(3)(B)(i)(III) (emphasis added), the 2004 amendments signal that Congress viewed parents as real parties in

interest when they file both administrative complaints and civil actions under IDEA. That language also demonstrates that Congress viewed the civil cause of action authorized by Section 1415(i)(2)(A) as inherently connected to the filing of the administrative complaint, which, as discussed, Congress plainly envisioned would be filed by parents as real parties in interest to the administrative proceedings. See pp. 12-13, *supra*. Furthermore, while the language of the 2004 amendments reaffirms that parents are real parties in interest in IDEA litigation, nothing in the statute (or legislative history) suggests that this represented any shift in Congress's understanding as to how IDEA was always intended to work.[8]

---

[8] Although the Court need not decide which version of the statute applies here, the 2004 amendments govern petitioners' case with respect to the question presented. Those amendments took effect on July 1, 2005, see Pub. L. No. 108-446, § 302(a)(1), 118 Stat. 2803, before the filing of petitioners' merits appeal to the Sixth Circuit. Thus, the statute as amended in 2004 was the version in effect at the time of the proceedings in the court of appeals. Contrast *Schaffer*, 126 S. Ct. at 532 (applying pre-2004 version of IDEA because that version "was in effect during the proceedings below"). Moreover, there was no reason not to give that provision immediate effect in pending cases. Under *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994), a statute operates retroactively only if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Ibid*. Respondent surely cannot claim any of its interests are implicated. The opposing party would hardly seem to have a vested interest in precluding the other party from proceeding *pro se*. Nor is applying this rule to pending cases a retroactive application at all, because the relevant event for judging retroactivity is the ongoing self-representation prospectively. See *id*. at 290-293 (Scalia, J., concurring); cf. *Martin* v. *Hadix*, 527 U.S. 343, 360-361 (1999) (applying attorneys' fees limitations of Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat.

3. In support of the court of appeals' decision, respondent has relied heavily on congressional *inaction*. See Br. in Opp. 5-6, 14-15. In May 2004, the Senate passed a bill that would have amended 20 U.S.C. 1415(i) to provide that "a parent of a child with a disability may represent *the child* in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004) (emphasis added). The Conference Committee—without explanation—omitted this provision from the final version of the IDEA amendments that Congress enacted in 2004. See H.R. Conf. Rep. No. 779, 108th Cong., 2d Sess. 220 (2004). This failed amendment, however, "lacks persuasive significance." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

As this Court has emphasized, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Central Bank of Denver*, 511 U.S. at 187 (citation omitted). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Ibid.* (citation omitted). At any rate, even if the failed Senate amendment were relevant to whether parents may proceed *pro se* on behalf of their *children*, it does

---

1321, in pending cases to legal services provided after effective date of the Act). Thus, applying the 2004 amendments is consistent with *Landgraf*. In any event, the 2004 amendments did not change the law with respect to *pro se* representation because, for the reasons explained above, parents enjoyed the right to proceed *pro se* in federal court under the version of IDEA before 2004. The 2004 amendments simply make the law clearer.

not undermine the conclusion that parents may represent *themselves* in federal court on their *own* substantive and procedural IDEA claims. Indeed, one natural inference is that Congress ultimately concluded that the Senate amendment was unnecessary because other provisions of IDEA confirm that parents are real parties in interest entitled to pursue their own substantive and procedural IDEA claims in court, and 28 U.S.C. 1654 already provides that such parties may proceed *pro se*. See pp. 20-23, *supra*.

4. Respondent also has relied on the canon of *expressio unius est exclusio alterius*, pointing out that although IDEA contains a provision expressly allowing parties to proceed in an administrative hearing without an attorney, see 20 U.S.C. 1415(h),[9] the statute contains no comparable provision pertaining to court actions. See Br. in Opp. 11-12. The *expressio unius* canon has limited force, see *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003), and thus cannot overcome the persuasive textual evidence discussed above. But the canon has no application when there is an independent explanation for Congress's failure to address the issue explicitly in one of the contexts. Here, the omission reveals nothing about whether Congress intended to authorize parents to proceed *pro se* in federal court. Congress had no need to address the issue in IDEA because—unlike the situation with respect to administrative proceed-

---

[9] "Any party to [an administrative] hearing * * * shall be accorded * * * the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," and "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses." 20 U.S.C. 1415(h). These procedural rights apply to "all parties," *Schaffer*, 126 S. Ct. at 532, including local educational agencies.

ings—another federal statute (28 U.S.C. 1654) already provided parties the right to pursue their own claims *pro se* in federal lawsuits.

C. Because Procedural And Substantive Claims Under IDEA Are Inextricably Intertwined, The Act Should Not Be Interpreted To Allow Parents To Proceed *Pro Se* To Enforce Procedural, But Not Substantive, Rights

Unlike the Sixth Circuit, which appears to prohibit parents from proceeding *pro se* in federal court on any type of IDEA claim (see pp. 5-6, *supra*), the Third Circuit has held that parents may litigate their own procedural claims *pro se*, but are barred from proceeding without an attorney when bringing substantive IDEA claims relating to the provision of a free appropriate public education to their children. *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 227, 230-236 (3d Cir. 1998). The Third Circuit's approach—under which the right to proceed *pro se* hinges on whether the claim is deemed procedural or substantive—not only conflicts with the plain language and structure of the statute (see pp. 12-23, *supra*), but also is unworkable in practice.

"[P]rocedural and substantive rights under IDEA are inextricably intertwined," and thus the "distinction between procedural and substantive claims" under the statute "is often far from clear." *Maroni*, 346 F.3d at 253, 255. This Court recognized as much in *Rowley*, when it observed that "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process * * * as it did upon the measurement of the resulting IEP against a substantive standard." 458 U.S. at 205-206. The statute's clear emphasis on procedural guarantees, the

Court concluded, "demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206.

The connection between procedural guarantees and substantive rights is underscored by the 2004 amendments to IDEA, in which Congress limited the grounds on which an administrative hearing officer could grant relief for IDEA violations. Those amendments added a new provision mandating that "a decision made by a hearing officer [in a due process hearing] shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. 1415(f)(3)(E)(i). Congress provided that, under this provision, procedural violations are deemed sufficiently serious to qualify as a denial of the substantive right to a free appropriate public education where the "procedural inadequacies" (1) "impede[] the child's right to a free appropriate public education"; (2) "significantly impede[] the parents' opportunity to participate in the decisionmaking process"; or (3) "caused a deprivation of educational benefits." 20 U.S.C. 1415(f)(3)(E)(ii). See H.R. Conf. Rep. No. 779, *supra*, at 219 (explaining that the new provision "allows procedural violations to rise to the level of a substantive violation under certain circumstances").

Similarly, several courts of appeals have held that parents who bring procedural claims under IDEA can obtain relief in federal court only if they demonstrate that the procedural violations interfered with the substantive right to a free appropriate public education. See *Kingsmore* v. *District of Columbia*, 466 F.3d 118, 119 (D.C. Cir. 2006) (joining "the majority of other cir-

cuits in ruling that a claim based on a violation of IDEA's procedural requirements 'is viable only if those procedural violations affected the student's *substantive* rights'") (quoting *Lesesne* v. *District of Columbia*, 447 F.3d 828, 834 (D.C. Cir. 2006)).[10] Consequently, even where the parents' complaint focuses on alleged procedural violations, the action will typically turn on whether there has been a denial of the substantive right to a free appropriate public education. See *Knable* v. *Bexley City Sch. Dist.*, 238 F.3d 755, 764-767, 771 (6th Cir.) (concluding that violation of parents' procedural rights constituted a substantive denial of a free appropriate public education, entitling parents to reimbursement for the costs of sending their son to private school), cert. denied, 533 U.S. 950 (2001).

Because procedural and substantive IDEA claims are inextricably intertwined, this Court should reject as unworkable an interpretation of the statute that would make the right to proceed *pro se* dependent on whether the parents' claims are deemed procedural or substantive. Instead, consistent with congressional intent, the Court should construe IDEA to permit parents to pursue both procedural and substantive claims *pro se* in federal court.

---

[10] Accord *Maroni*, 346 F.3d at 254 (1st Cir.); *DiBuo* v. *Board of Educ.* 309 F.3d 184, 190-191 (4th Cir. 2002); *Adam J.* v. *Keller Indep. Sch. Dist.*, 328 F.3d 804, 811-812 (5th Cir. 2003); *Nack* v. *Orange City Sch. Dist.*, 454 F.3d 604, 609 (6th Cir. 2006); *T.S.* v. *Independent Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001), cert. denied, 535 U.S. 927 (2002); *School Bd. of Collier County* v. *K.C.*, 285 F.3d 977, 981-982 (11th Cir. 2002).

D. Policy Concerns About The Burdens Of Meritless Litigation Do Not Justify Adopting An Interpretation Of IDEA At Odds With Its Plain Language And Structure

Respondent has argued (Br. in Opp. 15-16), as a policy matter, that permitting non-attorney parents to proceed *pro se* may increase the number of meritless IDEA lawsuits and thereby burden school districts and divert scarce resources from the education of children with disabilities. It is true that Congress expressed a concern about ensuring that litigation costs do not detract from the ultimate objectives of the program, but the balancing of such policy objectives is for Congress, not the courts. See *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001) (refusing to "disregard the clear legislative language" on the basis of "policy arguments").

Congress may have determined that prohibiting parents from proceeding *pro se* would have even greater countervailing costs because it could deny some individuals who have meritorious IDEA claims their day in court. Some lower courts have recognized the difficulty that many parents of disabled children face in finding attorneys willing to represent them in IDEA actions. See *Collinsgru*, 161 F.3d at 236 ("most attorneys will be reluctant to take on cases like this, characterized as they are by voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer"); see also *Maroni*, 346 F.3d at 257-258 & n.9. It is for Congress to decide whether the burden imposed by meritless litigation outweighs the risk that proper claimants will be denied their day in court.

Moreover, Congress has demonstrated that it is sensitive to the costs imposed by IDEA litigation and has

amended the statute to address those costs. In that regard, the 2004 amendments to IDEA may reduce the risk that *pro se* lawsuits will unduly burden school districts. As amended in 2004, IDEA expressly allows States and local school districts to recover attorneys' fees from a parent "if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. 1415(i)(3)(B)(i)(III). This provision may serve as a check on meritless *pro se* lawsuits or possibly defray their costs. If the 2004 amendments prove to be an inadequate deterrent to frivolous IDEA lawsuits, Congress can further amend the statute to address the problem. But the risk of such lawsuits in itself provides no basis to override the clear indications of Congress's intent to permit parents to proceed *pro se* in IDEA litigation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WAN J. KIM
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

DAVID K. FLYNN
GREGORY B. FRIEL
Attorneys

KENT D. TALBERT
General Counsel
Department of Education

DECEMBER 2006

965 C (10)

Supreme Court, U.S.
FILED
DEC 15 2006
CLERK

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, *et al.*,
Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AUTISM SOCIETY OF AMERICA, NORTHERN VIRGINIA CHAPTER, COALITION OF TEXANS WITH DISABILITIES, DISABILITY LAW & ADVOCACY CENTER OF TENNESSEE, KENTUCKY PROTECTION AND ADVOCACY, MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC., NATIONAL DISABILITY RIGHTS NETWORK, PARENTADVOCATES.ORG, PARENTS FOR AUTISTIC CHILDREN'S EDUCATION, AND JEFF AND SHARON PODOWITZ, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ILISE L. FEITSHANS
120 Warwick Rd
Haddonfield, NJ 08033
(856) 428-0605

BARBARA E. ETKIND *
PRASHANT K. KHETAN
KIMBERLY A. ASHMORE
ROSS, DIXON & BELL, LLP
2001 K Street, N.W.
Washington, D.C. 20006
(202) 662-2000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
ARGUMENT	3
I. THE DECISION OF THE SIXTH CIRCUIT SHOULD BE REVERSED BECAUSE IT PRODUCES RESULTS INCONSISTENT WITH CONGRESS'S INTENT IN ENACTING THE IDEA	3
A. Statutes Should Be Construed to Effectuate Congressional Intent	4
B. Affirmance of the Sixth Circuit's Decision Would Produce Results So Inconsistent with Congress's Intent in Enacting the IDEA as to Be Absurd	5
1. The Vast Majority of Parents with Rights Under the IDEA Have No Alternative but to Proceed Pro Se	6
a) Although Advocacy Organizations Exist to Provide Legal Assistance to Parents, They Have Extremely Limited Resources	6
b) Nor Can Private Attorneys Fill the Void	8
c) The Attorneys' Fees Provision in the IDEA Has Not Been Interpreted in a Manner that Addresses this Issue	11
2. At All Other Levels of IDEA Enforcement, Parents May Proceed Without Attorneys	13

TABLE OF CONTENTS—Continued

Page

3. School Districts will be Guaranteed Success Simply by Forcing Lawsuits into Federal Court 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES Page

Board of Education v. Rowley, 458 U.S. 176 (1982) 4
Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691 (2003) 13
Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001) 11
Cedar Rapids Community Sch. District v. Garret F., 526 U.S. 66 (1999) 4
Chapman v. United States, 500 U.S. 453 (1991)... 4, 5
Clinton v. City of New York, 524 U.S. 417 (1998).. 4
Collinsgru v. Palmyra Board of Education, 161 F.3d 225 (3d Cir. 1998) 8, 9, 11
Dodd v. United States, 545 U.S. 353 (2005) 5
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 5
Haggar Co. v. Helvering, 308 U.S. 389 (1940)..... 5
J.C. v. Reg'l Sch. District 10, 278 F.3d 119 (2d Cir. 2002) 12
John T. ex rel. Paul T. v. Del. County Intermediate Unit, 318 F.3d 545 (3d Cir. 2003) . 11, 12
Maroni v. Pemi-Baker Reg'l Sch. District, 346 F.3d 247 (1st Cir. 2003) 13, 14
Scheidler v. National Organization for Women, Inc., __ U.S. __, 126 S. Ct. 1264 (2006) 4
T.D. v. LaGrange Sch. District No. 102, 349 F.3d 469 (7th Cir. 2003) 12
United States v. Ryan, 284 U.S. 167 (1931)..... 5

STATUTES, REGULATIONS AND LEGISLATIVE HISTORY

20 U.S.C. § 1400 ..... *passim*
20 U.S.C. § 1415 ..... 11, 12, 13

TABLE OF AUTHORITIES—Continued

Page

150 Cong. Rec. S5250-02 (2004) 10
34 C.F.R. Pt. 300 13
N.H. Rev. Stat. Ann. § 311:1 (2006) 14

MISCELLANEOUS

M. Brendhan Flynn, *Note, In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881 (2005) .. 5

Mary Wagner, *et al., The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities And Their Households* (Sept. 2002), *available at* http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (last visited Dec. 7, 2006) 10

Mary Wagner, *et al., The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2)* (Aug. 2003), *available at* http://www.nlts2.org/reports/2003_08/nlts2_report_2003_08_execsum.pdf (last visited Dec. 7, 2006) 10

NDRN, *Repairing the Unraveling Safety Net: 2005 Annual Report, available at* http://www.ndrn.org/pub/annrpt/2005/2005FYrpt.pdf (last visited Dec. 7, 2006) 4

NDRN, *The Protection and Advocacy for Developmental Disabilities Program: Report of 2005 Activities* (2005), *available at* http://www.ndrn.org/pub/annrpt/2005/PADD.pdf (last visited Dec. 7, 2006) 6

TABLE OF AUTHORITIES—Continued

Page

National Council on Disability, *National Disability Policy: A Progress Report, December 2003-December 2004* (November 2005), *available at* http://www.ncd.gov/newsroom/publications/2005 /progress_report.htm (last visited Dec. 7, 2006) 12

National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education?* (July 2003), *available at* http://www.nichcy.org/pubs/research/rb2.pdf (last visited Dec. 7, 2006) 10

INTEREST OF THE *AMICI CURIAE* [1]

Autism Society of America, Northern Virginia Chapter (ASA-NV), is a non-profit organization that provides support, in the areas of education, vocational training and recreation, to families of individuals with autism. ASA-NV aids families through the collection and dissemination of information to parents, professionals and the general public, and fosters and reinforces awareness and respect for the rights of parents as the primary case managers in the lives of an autistic family member.

Coalition of Texans with Disabilities is a public interest organization, founded in 1978 by people with disabilities, that provides advocacy services to people of all disabilities and ages.

Disability Law & Advocacy Center of Tennessee (DLAC) is a federally funded and authorized Protection and Advocacy (P&A) organization that has provided advocacy services to people with disabilities in Tennessee since 1978. DLAC advocates for the educational rights of students and their parents under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA), through legal representation and training for individuals and groups and by providing support in the development of individualized education programs (IEPs). DLAC also serves as a resource for private attorneys, government officials and school personnel.

Kentucky Protection and Advocacy (KPA) is an independent state agency that is the federally mandated P&A organization in Kentucky. KPA provides advocacy services

---

[1] Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel to a party authored this brief in whole or in part and that no person other than the *amici curiae* and their members made a financial contribution towards the preparation and submission of the brief. Letters reflecting the consent of the parties have been lodged with the Clerk.

to promote and protect the rights of individuals with disabilities, including the rights of parents to have their children receive, and of children to receive, a free appropriate public education (FAPE) under the IDEA.

Michigan Protection and Advocacy Service, Inc. (MPAS) is a federally funded and authorized P&A organization that has provided advocacy services to people with disabilities in Michigan since 1981. MPAS provides information and referral services to people who need information or assistance on IDEA issues, and provides direct representation in selected cases involving students with disabilities receiving special education services and support under the IDEA.

National Disability Rights Network (NDRN) is the membership association of P&A agencies that are located in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands and includes a Native American Program. P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

Parentadvocates.org is the d/b/a of the E-Accountability Foundation, a Section 501(c)(3) non-profit organization dedicated to informing parents and children of their legal rights and assisting in the processes required to obtain an appropriate educational program for every child.

Parents for Autistic Children's Education (PACE) is a not-for-profit membership organization that serves parents and guardians of children with autism or similar disorders in the Northern Virginia area. PACE advocates on behalf of children with autism and their families for high-quality,

effective and scientifically based educational programs and to ensure school-system compliance with the IDEA.

Jeff and Sharon Podowitz seek, for themselves and their son, the right to participate in special education litigation without counsel.

Amici regularly represent and advocate for the interests of children and parents in their ongoing pursuit of free appropriate public education for the disabled and thus have a significant interest in the Court's decision in this case. As one of the primary resources available to families of children with disabilities, *amici* write to offer a unique perspective on the reasons why parents must be permitted to proceed in court *pro se* to assert rights under the IDEA. *Amici* concur with the arguments made by petitioners and the other *amici* supporting them. In accordance with Sup. Ct. R. 37.1, *amici* will not repeat those arguments here. Rather, *amici* submit this brief to bring to the Court's attention certain statistics that demonstrate why an affirmance of the Sixth Circuit's decision would bring about results wholly inconsistent with Congress's intent in passing the IDEA.

ARGUMENT

I. THE DECISION OF THE SIXTH CIRCUIT SHOULD BE REVERSED BECAUSE IT PRODUCES RESULTS INCONSISTENT WITH CONGRESS'S INTENT IN ENACTING THE IDEA.

Education remains the key to becoming a productive member of society. With particular respect to the education of individuals with disabilities,

> [t]he past 30 years have seen a vast improvement in the area of education, including the very recognition that individuals with disabilities should be educated; the identification of best practices in the education of

> individuals with a wide range of disabilities; and the inclusion of such individuals in regular classroom settings. Unfortunately, we are now seeing the unraveling of this essential safety net, as well.

NDRN, *Repairing the Unraveling Safety Net: 2005 Annual Report*, at 12 (2005), *available at* http://www.ndrn.org/pub/annrpt/2005/2005FYrpt.pdf (last visited Dec. 7, 2006). The Sixth Circuit's ruling renders that net so permeable as to permit the majority of children with disabilities to fall through it.

A. Statutes Should Be Construed to Effectuate Congressional Intent.

The goal of interpreting any federal statute is to effectuate congressional intent. *See Scheidler v. Nat'l Org. for Women, Inc.*, __ U.S. __, 126 S. Ct. 1264, 1273-74 (2006) (noting that canons of statutory construction "are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent"). Indeed, with particular respect to the IDEA, this Court has sought to conform its interpretations of provisions of the statute to Congress's intent in enacting it. *See, e.g., Bd. of Educ. v. Rowley*, 458 U.S. 176, 189-204 (1982) (examining congressional intent to interpret the requirement of a FAPE); *Cedar Rapids Cmty. Sch. Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 77-78 (1999) (same in construing the term "related services" under the IDEA).

The IDEA thus must be construed in a manner that yields results that are consistent with Congress's intent in enacting the statute. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 429 (1998) ("Acceptance of the Government's newfound reading of [the statute] would produce an absurd and unjust result which Congress could not have intended[.]") (internal quotations and citation omitted); *Chapman v.*

United States, 500 U.S. 453, 476 & n.13 (1991) (Stevens, J., dissenting) (citing cases for the proposition that the Court does not interpret a statute in a manner that reaches an absurd result "on the ground that Congress could not have intended such an outcome"); *Dodd v. United States*, 545 U.S. 353, 368-69 (2005) (Stevens, J., dissenting) ("It is this absurd result that convinces me that Congress could not have intended that [the statute] should be read in this manner."); *see also Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *United States v. Ryan*, 284 U.S. 167, 175 (1931). As set forth below, the Sixth Circuit's ruling must be reversed because that court's interpretation of the IDEA—that parents cannot proceed in court *pro se* – would produce results that are so inconsistent with Congress's intent in enacting the IDEA as to be absurd.

B. Affirmance of the Sixth Circuit's Decision Would Produce Results So Inconsistent with Congress's Intent in Enacting the IDEA as to Be Absurd.

> The importance of having a vigorous system of judicial review is apparent since states are lax in enforcing school compliance with the IDEA, some schools traditionally override parents' concerns about their child's IEP, and because due process hearings are skewed against poor children.

M. Brendhan Flynn, *Note, In Defense of Maroni: Why Parents Should be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881, 887-88 (2005) (citations omitted). To this end, and to the extent that parents are not permitted to proceed *pro se* under the statute, the rights provided to families under the IDEA will be rendered meaningless because there will be no way to enforce them. This absurd result is in direct conflict with the reasons underlying the

statute, and it cannot possibly be what Congress intended when it enacted the IDEA.

1. *The Vast Majority of Parents with Rights Under the IDEA Have No Alternative but to Proceed Pro Se.*

The statistics are clear that the majority of parents have insufficient resources to enforce rights guaranteed by the IDEA in any meaningful manner other than *pro se*. *See, e.g.*, NDRN, *The Protection and Advocacy for Developmental Disabilities Program: Report of 2005 Activities*, at 4 (2005), *available at* http://www.ndrn.org/pub/annrpt/2005/PADD.pdf (last visited Dec. 7, 2006) ("Parents of children with developmental disabilities have few resources to help them understand and negotiate the special education process."); *see also infra* note 3. Permitting the court of appeals' decision to stand thus would render illusory the rights guaranteed to families under the IDEA.

a) Although Advocacy Organizations Exist to Provide Legal Assistance to Parents, They Have Extremely Limited Resources.

Respondent asserted that public interest legal services are available to assist parents in pursuing their rights. (Brief in Opposition to the Petition for Writ of Certiorari (Opp.) at 17-18.) *Amici*, as the primary source of legal services available to parents, have a unique (and very different) perspective on this issue, however. The facts below (obtained from NDRN, the membership association of state P&As, which, in turn, obtained the information directly from the P&As[2]) demonstrate that these organizations have

[2] An affidavit in support of this data is on file with counsel of record.

insufficient resources to satisfy the overwhelming need for their services:

- Alabama Disabilities Advocacy Program received 905 special education requests in fiscal year 2005. Its staff of one full-time attorney was able to provide case advocacy services in response to only thirteen percent of those requests.
- Ohio Legal Rights Service received 595 requests in fiscal year 2006 and provided substantive assistance in less than three percent of those requests. The organization has four attorneys and two advocates who handle special education cases, none of whom works on the cases full-time.
- In fiscal year 2005, Arizona Center for Disability Law was able to assist with only fourteen percent of the 1,627 requests that it received that year. The organization currently has one full-time and three part-time employees assisting with special education matters.
- Legal Center for People with Disabilities and Older People in Colorado received 1,419 requests from 2004 through November 2006, and its staff of two special education attorneys was able to handle less than seventeen percent of those cases.
- MPAS received 10,399 requests between October 1, 1999 and January 31, 2006, and was able to provide representation in only seventeen percent of those cases. Its staff consists of four attorneys, none of whom handles special education cases full-time, and two of whom focus primarily on other areas of practice.
- KPA received 515 requests from October 2005 through September 2006 and its staff of two full-time and one part-time attorneys (none of whom work exclusively on special education cases; the part-time attorney provides information and referral

assistance only) assisted with less than twenty percent of those cases.

- Between January 2003 and November 2006, Disability Law Center of Alaska received 1,125 requests for services and had to reject seventy-seven percent of them. The organization has two part-time special education attorneys.
- Disability Rights Wisconsin receives approximately 175 requests for assistance each year. The organization's staff of only two special education attorneys (one of whom is part-time), together with private attorneys to whom it refers cases, is able to assist with less than one-quarter of the requests for legal assistance that it receives each year.
- Maine's Disability Rights Center has one special education attorney and three non-attorney advocates on staff who were unable to assist with more than sixty percent of the 387 requests that were received during fiscal year 2006.
- In the past year, Massachusetts Disability Law Center received approximately 570 requests and was able to assist with less than half of them.

b) Nor Can Private Attorneys Fill the Void.

Respondent also asserted that there exist low-cost and court-appointed counsel available to assert the rights guaranteed under the IDEA. (Opp. at 18.) This contention is without merit for several reasons. First, there is an insufficient number of qualified attorneys to represent parents in IDEA cases. "[M]ost attorneys will be reluctant to take on cases * * * characterized * * * by voluminous administrative records, long administrative hearings, and specialized legal issues, without a significant retainer." *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 236 (3d

Cir. 1998). The statistics (also obtained from NDRN) bear this out:

- There is one private attorney for the entire state of Alaska who assists with special education cases.
- In Wisconsin, there is one full-time private attorney who represents parents and children in special education cases, and five who handle the cases as a significant part of their practice. Together, the six private attorneys accept approximately *five referrals each year* from Disability Rights Wisconsin.
- MPAS has three attorneys on its official referral list, and is aware of eight other private attorneys who handle special education cases. More than half of these attorneys are located in one county, and seventy-eight of Michigan's eighty-three counties have no private special education attorneys.
- Arizona Center for Disability Law is aware of only two private attorneys who accept referrals for special education matters.
- KPA has four private attorneys on its referral list, but none accepts cases in western Kentucky. No private attorney accepted referrals from KPA from October 2005 through September 2006.
- North Dakota P&A Project is aware of two private attorneys that have worked on special education cases in the past. Last year, however, only one case was handled by a private attorney, and that was with the assistance of the organization.
- There are only five private attorneys in Alabama who handle special education cases.
- Legal Center for People with Disabilities and Older People in Colorado is aware of four private attorneys who handle special education cases. The private attorneys accept very few referrals from the organization.

- There are approximately six private special education attorneys in the entire state of Maine.

Even if there were a sufficient number of attorneys willing to take these cases, to the extent such counsel are private and not court-appointed (as most are), parents of children with disabilities simply are unable to afford them. *See* Mary Wagner, *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2)* at 2 (Aug. 2003), *available at* http://www.nlts2.org/reports/2003_08/nlts2_report_2003_08_execsum.pdf (last visited Dec. 7, 2006) (noting that almost twice as many children with disabilities as children in the overall general population live in households whose head is not employed); *see also* 150 Cong. Rec. S5250-02, S5351 (daily ed. May 12, 2004) (statement of Sen. Kennedy) ("Most parents don't have access to an attorney, or must rely on low-cost legal aid. And data from surveys shows that even this help is in short supply."). Indeed, because parents of children with disabilities often live below the poverty line, payment of a retainer is not an option available to many parents. Mary Wagner, *et al.*, *The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities And Their Households* at 28 (Sept. 2002), *available at* http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (last visited Dec. 7, 2006); National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education?* at 6 (July 2003), *available at* http://www.nichcy.org/pubs/research/rb2.pdf (last visited Dec. 7, 2006).[3]

---

[3] For further briefing on the disproportionate economic level of families of children with disabilities, *amici* refer the Court to Section II.A. of the brief submitted by *amici* Council of Parent Attorneys and Advocates, Inc., et al.

c) The Attorneys' Fees Provision in the IDEA Has Not Been Interpreted in a Manner that Addresses this Issue.

Congress, perhaps cognizant of the above shortfalls in attorney availability for IDEA cases, *see Collinsgru*, 161 F.3d at 236, included within the statute an attorneys' fees provision that awards fees "to a *prevailing party* who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B)(i)(I) (emphasis added). However, courts have interpreted the attorneys' fees provision in a manner that provides little incentive for attorneys to assist with these cases. Indeed, according to these rulings, even where a parent is successful in obtaining the requested relief in a particular IDEA case, the parent may not be considered a "prevailing party" within the meaning of the statute such that he or she is entitled to attorneys' fees.

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), this Court held that where a settlement is reached prior to adjudication on the merits (regardless of the amount of attorneys' fees incurred to that point), the party achieving its desired result may not be considered a "prevailing party." *See id.* at 600. Rather, in order to be a "prevailing party" entitled to attorneys' fees, the party must achieve a judicially sanctioned change in the legal relationship of the parties. *Id.* at 603-05. Although *Buckhannon* was not an IDEA case, the Court noted that Congress authorized the award of attorneys' fees to the "prevailing party" in numerous statutes and that the Court has interpreted the fee-shifting provisions in those statutes consistently. *Id.* at 602-03 & n.4. In fact, subsequent courts have embraced *Buckhannon's* broad language and have applied its holding to deny or limit attorneys' fees in IDEA cases. *See, e.g., John T. ex rel. Paul T. v. Del. County Intermediate Unit*, 318 F.3d 545, 556-61 (3d Cir. 2003) (affirming denial of

attorneys' fees to parents who, after obtaining preliminary injunction, voluntarily dismissed complaint once school district agreed to implement a new IEP); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 123-25 (2d Cir. 2002) (holding that plaintiff was not entitled to attorneys' fees where the school voluntarily provided all requested relief); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 475-80 (7th Cir. 2003) (holding that parents were not entitled to portion of attorneys' fees incurred in seeking judicial review where settlement was reached immediately prior to trial, but upholding fee award to the extent parents succeeded at the administrative hearing).

Concern also has been expressed that other aspects of the attorneys' fees provision may serve as a deterrent to attorneys who otherwise might be willing to handle these cases. Specifically, the IDEA provides that a school district may recover from a parent's attorney the attorneys' fees incurred by the school district in defending against a claim that is "frivolous, unreasonable, or without foundation" or "presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). The IDEA's attorneys' fees provision thus may provide a *disincentive* for attorneys to represent families pursuing IDEA claims. *See* National Council on Disability, *National Disability Policy: A Progress Report, December 2003 – December 2004* at 63 (November 2005), *available at* http://www.ncd.gov/newsroom/publications/2005 /progress_report.htm (last visited Dec. 7, 2006) (noting that the National Council on Disability is "particularly concerned about how and by whom the notion of a 'frivolous,' 'unreasonable,' or 'without foundation' complaint will be defined" because "[i]t is easy to see how this threat could have a profoundly chilling effect on the assertion of meritorious claims").

2. *At All Other Levels of IDEA Enforcement, Parents May Proceed Without Attorneys.*

The IDEA actually discourages parents from obtaining legal counsel when they meet with school district officials to develop an IEP for their child out of concern that an attorney's presence could create an adversarial relationship between parents and the school district. *See Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 256 (1st Cir. 2003); *see also* 34 C.F.R. Pt. 300, App. A., question 29 (2006). And if a dispute rises to the level of a due process hearing, Congress permits parents to have counsel accompany and advise them at the administrative due process hearing, but does not require them to do so. *See* 20 U.S.C. § 1415(h)(1). It simply makes no sense to suggest that Congress intended for parents to have a choice regarding the use of counsel at the IEP and due process levels, but meant to require legal representation at the federal court level. *Maroni*, 346 F.3d at 256-57 ("It would be odd for Congress to exclude parents from the definition of 'parties aggrieved' as to substantive claims, and thus force them to find attorney representation at the federal court level, after giving parents such a strong role at every other stage of the process.").

3. *School Districts will be Guaranteed Success Simply by Forcing Lawsuits into Federal Court.*

It is even more illogical to read the statute in a way that effectively renders meaningless an option that Congress wrote into the IDEA—the right to bring suit in state *or* federal court. *See* 20 U.S.C. § 1415(i)(2)(A). Indeed, under the Sixth Circuit's ruling, a *pro se* parent's right to litigate an IDEA action would be thwarted by a school district that is able to have the case heard in federal court. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003). For

example, parents who cannot afford to hire a lawyer or otherwise obtain one may file suit in state court *pro se*, as some states permit. *See, e.g.*, N.H. Rev. Stat. Ann. § 311:1 (2006). The school district could guarantee victory, however, simply by removing the case to federal court, where the parents would not be allowed to proceed *pro se*. Moreover, in cases where *pro se* parents prevailed at the administrative hearing level, school districts could secure reversals simply by filing an appeal in federal court because, without an attorney, a family would be prohibited from appearing in court. Such absurd results plainly were not intended by Congress when it passed the IDEA.

As set forth above, the Sixth Circuit's ruling is inconsistent with Congress's intent in enacting the IDEA in that if left to stand, the ruling will produce absurd results. Indeed, and as the First Circuit held in *Maroni*, "[a] rule prohibiting *pro se* representation would subvert Congress's intent by denying many children with special needs their day in court." 346 F.3d at 257 (footnote omitted). In order to prevent these absurd results, parents must be permitted to proceed *pro se*.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be reversed.

Respectfully Submitted,

ILISE L. FEITSHANS
120 Warwick Rd
Haddonfield, NJ 08033
(856) 428-0605

Counsel for Jeff and Sharon Podowitz

BARBARA E. ETKIND *
PRASHANT K. KHETAN
KIMBERLY A. ASHMORE
ROSS, DIXON & BELL, LLP
2001 K Street, N.W.
Washington, D.C. 20006
(202) 662-2000

Counsel for Autism Society of America, Northern Virginia Chapter, Coalition of Texans with Disabilities, Disability Law & Advocacy Center of Tennessee, Kentucky Protection and Advocacy, Michigan Protection and Advocacy Service, Inc., National Disability Rights Network, Parentadvocates. org, Parents for Autistic Children's Education

* Counsel of Record

GRANTED

19

FILED
JAN 23 2007

No 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, ET AL ,

Petitioners,

v

PARMA CITY SCHOOL DISTRICT,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

PAMMELA QUINN
SHANNON PAZUR
NILAM A SANGHVI
KIRSTIN KLINGSICK*
O'MELVENY & MYERS LLP
1625 Eye Street, N W
Washington, D C 20006
(202) 383-5300

JULIE WRIGHT HALBERT
(*Counsel of Record*)
COUNCIL OF THE GREAT CITY SCHOOLS
1301 Pennsylvania Ave ,
N W , Suite 702
Washington, D C 20004
(202) 394-2427

*Admitted only in Illinois

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. CONGRESS SPECIFICALLY INTENDED NOT TO ALLOW *PRO SE* SUITS BY PARENTS UNDER THE IDEA. 3

A. The IDEA Evinces A Congressional Intent To Reduce The Burdens Of Litigation On School Districts. 3

B. The Absence Of An Authorization In The IDEA For *Pro Se* Suits Reflects The Considered Judgment Of Congress. 7

II. *PRO SE* LITIGATION IN IDEA CASES IMPOSES HIGH COSTS ON SCHOOL DISTRICTS. 10

A. Allowing *Pro Se* Litigation By Parents Under The IDEA Would Increase The Already High Cost Of Litigation And Drain Scarce Resources From The Public Schools. 11

B. The Core Purposes Of The Statute May Be Vindicated Without Authorizing *Pro Se* Litigation In IDEA Cases. 17

C. Children Would Be Adversely Affected If *Pro Se* Litigation Were Allowed Under The IDEA. 21

TABLE OF CONTENTS
(continued)

Page

III. UNDER THE SPENDING CLAUSE, CONGRESS COULD NOT HAVE IMPOSED SUCH A BURDEN ON SCHOOL DISTRICTS WITHOUT PROVIDING CLEAR NOTICE. 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Abdul-Akbar v. Watson,
901 F.2d 329 (3d Cir. 1990).....16, 19

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,
126 S. Ct. 2455 (2006).....4, 25, 27

Cedar Rapids Cmty. Sch. Dist. v. Garret F.,
526 U.S. 66 (1999).....26

Christian v. Clark County Sch. Dist.,
Nos. CV-S-04-0389 RLH (GWF), CV-S-04-0390 BES (GWK) (D. Nev.).....20

City of Riverside v. Rivera,
477 U.S. 561 (1986).....18

Deal v. Hamilton County Bd. of Educ.,
392 F.3d 840 (6th Cir. 2004).....12

Devine v. Indian River County Sch. Bd.,
121 F.3d 576 (11th Cir. 1997).....25

Doe v. Bd. of Educ.,
165 F.3d 260 (4th Cir. 1998).....19, 22

Hannon v. Sec. Nat'l Bank,
537 F.2d 327 (9th Cir. 1976).....18

Herrera-Venegas v. Sanchez-Rivera,
681 F.2d 41 (1st Cir. 1982).....29

Jones v. Niagara Frontier Transp. Auth.,
722 F.2d 20 (2d Cir. 1983).....16

TABLE OF AUTHORITIES
(continued)

Page(s)

Linda W. v. Indiana Dep't of Educ.,
200 F.3d 504 (7th Cir. 1999) 4

Maroni v. Pemi-Baker Regional School District,
346 F.3d 247 (1st Cir. 2003) 8, 17

Osei-Afriyie v. Med. College of Penn.,
937 F.2d 876 (3d Cir. 1991) 23

Pennhurst State Sch. & Hosp. v. Halderman,
451 U.S. 1 (1981) 26

Rapanos v. United States,
126 S. Ct. 2208 (2006) 9

Schaffer v. Weast,
126 S. Ct. 528 (2005) 4, 28

United States v. Texas,
507 U.S. 529 (1993) 29

Wright v. Clark County Sch. Dist.,
Nos. CV-S-98-171 DWH (LRL), CV-S-98-998 DWH (LRL) (D. Nev.) 24

Winkelman v. Parma City Sch. Dist.,
166 Fed. Appx. 807 (6th Cir. 2006) 23

STATUTES

20 U.S.C. § 1400 4

20 U.S.C. § 1408 4

20 U.S.C. § 1412 14

20 U.S.C. § 1415 ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 1654 ..... 25, 29

28 U.S.C. § 1915 19

RULES AND REGULATIONS

34 C.F.R. § 300.507 18

Federal Rule of Civil Procedure 17 19

LEGISLATIVE MATERIALS

149 Cong. Rec. H3461 (2003) 5

150 Cong. Rec. H10022 (2004) 9

150 Cong. Rec. S5351 (2004) 12

150 Cong. Rec. S5352 (2004) 13, 15, 18, 20

150 Cong. Rec. S11660 (2004) 9

H.R. Rep. 108-779 (2004) (Conf. Rep.) 8, 9

S. Rep. No. 108-185 (2003) 5, 7, 8

S. 1248, 108th Cong. § 614(i)(4) 7, 8

OTHER MATERIALS

Kathleen Baydala, *Schools Pay $2.3 Million Legal Tab to Defend Special Education Lawsuit*, Chattanooga Times Free Press, Mar. 17, 2005 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Statement of Chairman John A. Boehner, Comm. on Educ. and the Workforce, April 10, 2003, *available at* http://www.cec.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=5469 5

Thomas H. Boyd, *Minnesota's Pro Bono Appellate Program: A Simple Approach That Achieves Important Objectives*, 6 J. App. Prac. & Process 295 (2004) 22

Jay G. Chambers, et al., American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?* 5 (2003) 12

Jay G. Chambers, et al., American Institutes for Research, *What are We Spending on Special Education Services in the United States, 1999-2000?* 14 (2004) 11

John A. Kirlin, et al., *Final Report on Focus Study III: The Burden of Paperwork and Administrative Duties in Special Education* 31 (2004) 11, 13

Andriy Krahmal, et al., *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 Tex. J.C.L. & C.R. 201, 220 (2004) 10, 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Allan G. Osbourne, Jr., *Proving That You Have Provided a FAPE Under IDEA*, 151 Educ. L. Rep. 367 (2001) 13

Thomas Parrish et al., Center for Special Education Finance, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* 22 (2004) 10

Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1997 Ann. Surv. Am. L. 124 ..... 16, 19, 22

Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 Am. U.L. Rev. 1537 (2005) 22

Drew A. Swank, *The Pro Se Phenomenon*, 19 B.Y.U.J. Pub. L. 373 (2005) 24

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the Council of the Great City Schools as *amicus curiae* in support of respondent.[1]

INTEREST OF *AMICUS CURIAE*

The Council of the Great City Schools ("Council") is a coalition of 66 of the nation's largest urban public school systems.[2] Founded in 1956 and incorporated in 1961, the

---

[1] Pursuant to Rule 37, blanket letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel contributed monetarily to the brief.

[2] Member school districts include Albuquerque Public Schools, Anchorage School District, Atlanta Public Schools, Austin Independent School District, Baltimore City Public Schools, Birmingham City Schools, Boston Public Schools, Broward County Public Schools, Buffalo City School District, Caddo Parish School District, Charleston County Public Schools, Charlotte-Mecklenburg Schools, Chicago Public Schools, Christina School District, Cincinnati Public Schools, Clark County School District, Cleveland Municipal School District, Columbus Public Schools, Dallas Independent School District, Dayton Public Schools, Denver Public Schools, Des Moines Independent Community School District, Detroit Public Schools, District of Columbia Public Schools, Duval County Public Schools, East Baton Rouge Parish School System, Fort Worth Independent School District, Fresno Unified School District, Guilford County Schools, Hillsborough County School District, Houston Independent School District, Indianapolis Public Schools, Jackson Public School District, Jefferson County Public Schools, Kansas City Missouri School District, Long Beach Unified School District, Los Angeles Unified School District, Memphis City Public Schools, Metropolitan Nashville Public Schools, Miami-Dade County Public Schools, Milwaukee Public Schools, Minneapolis Public Schools, New Orleans Public Schools, New York City Department of Education, Newark Public Schools, Norfolk Public Schools, Oakland Unified School District, Oklahoma City Public Schools, Omaha Public Schools, Orange County Public Schools, Palm Beach County Schools, Philadelphia Public Schools,

Council is located in Washington, D.C., where it works to promote urban education through legislation, research, media relations, instruction, management, technology, and other special projects. The Council serves as the national voice for urban educators, providing ways to share promising practices and address common concerns. For the past several years, the Council's legislative and legal staff has participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997 and the Individuals with the Disabilities Education Improvement Act of 2004.

INTRODUCTION AND SUMMARY OF ARGUMENT

The argument advanced by Petitioners and the United States – that the Individuals with Disabilities Education Act ("IDEA") permits parents to proceed *pro se* to assert claims under a statute that confers rights only on their children – completely ignores the long-settled, common law and statutory definition of what it means to proceed "*pro se*." It also flies in the face of what Congress actually intended in enacting the IDEA and what any reasonable State or school district official reading the statute would assume Congress intended.

Congress considered including in the IDEA the exact provision that Petitioners now wish was there. Ultimately, however, Congress rejected that provision, a decision consistent with its general reticence – demonstrated by many other provisions throughout the statute – to impose additional burdensome costs on school districts. In fact, the congressional

---

Pittsburgh Public Schools, Portland Public Schools, Providence Public Schools, Richmond Public Schools, Rochester City School District, Sacramento City Unified School District, Salt Lake City School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, St. Louis Public Schools, St. Paul Public Schools, Toledo Public Schools, and Wichita Public Schools.

BEST AVAILABLE COPY

fears underlying this policy decision would be (and have been) borne out by an overwhelmingly large percentage of frivolous *pro se* suits, as compared to ones brought by represented parties.

Furthermore, even if this clear congressional intent not to allow *pro se* suits had not been expressed in the text of the statute (it was), that would be insufficient to permit Petitioners to proceed here. The Spending Clause, upon which Congress relied in enacting the IDEA, requires that congressional intent be clear, so as to give notice to school districts upon whom the expensive burdens of the *pro se* suits would fall. School districts had no such notice, and the statute must therefore be interpreted not to impose such a burden. For all of these reasons, the decision below should be affirmed.

ARGUMENT

I. CONGRESS SPECIFICALLY INTENDED NOT TO ALLOW *PRO SE* SUITS BY PARENTS UNDER THE IDEA.

It is difficult, if not impossible, to imagine a statute with a legislative history that more clearly demonstrates congressional intent with respect to the exact question presented to this Court as the IDEA in this case. Furthermore, this clear legislative history, including Congress's rejection of the *precise* statutory provision Petitioners seek to read into this statute, is completely consistent with numerous other provisions in the statute all aimed at the same purpose – reducing litigation and the associated costs and burdens on the school districts that have to defend such suits.

A. The IDEA Evinces A Congressional Intent To Reduce The Burdens Of Litigation On School Districts.

Consistent with the core purpose of the IDEA – provision of a free appropriate public education ("FAPE") to children

with disabilities – Congress has always been mindful of the administrative and financial burdens that the statute inflicts on school districts, potentially to the detriment of that core purpose. *See Schaffer v. Weast*, 126 S. Ct. 528, 535 (2005) ("Congress has . . . repeatedly amended the Act in order to reduce its administrative and litigation-related costs.").[3] This concern – which has been echoed by this Court and the courts of appeals in numerous cases[4] – can be seen throughout the IDEA and its recent amendments.

Most obviously, the statute emphasizes the administrative process and strongly encourages informal resolution of *all* IDEA claims without resort to the judicial process. *See* 20 U.S.C. § 1400(c)(8) ("Parents and schools should be

---

[3] In *Schaffer*, this Court cited examples of statutory provisions embodying Congress' goal of reducing IDEA compliance costs:

> For example, in 1997 Congress mandated that States offer mediation for IDEA disputes. In 2004, Congress added a mandatory "resolution session" prior to any due process hearing. It also made new findings that "parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways," and that "[t]eachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes."

126 S. Ct. at 535 (citing 20 U.S.C. §§ 1415(e), 1415(f)(1)(B), 1400(c)(8),(9)); *see also, e.g.*, 20 U.S.C. § 1408 (creating a pilot program to help States "identify ways to reduce paperwork burdens and other administrative duties that are directly associated with the requirements of this chapter, in order to increase the time and resources available for instruction and other activities aimed at improving educational and functional results for children with disabilities").

[4] *See, e.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2463 (2006) ("the IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations"); *Linda W. v. Indiana Dep't of Educ.*, 200 F.3d 504, 506 (7th Cir. 1999) (taking costs to school districts into account in interpreting the IDEA).

given expanded opportunities to resolve their disagreements in positive and constructive ways."). The legislative history of the recent amendments is replete with language encouraging mediation of IDEA disputes in order to avoid litigation and its attendant costs. S. Rep. No. 108-185, at 36 (2003) ("The committee is encouraged by the success of mediation occurring throughout the nation in resolving disputes between parties under IDEA."); *see also id.* (acknowledging states that have successfully encouraged mediation, and specifically noting "an estimated savings of $50 million in attorneys' fees and related expenses" in Texas alone); *see also* Statement of Chairman John A. Boehner, Comm. on Educ. and the Workforce, April 10, 2003, *available at* http://www.cec.sped.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=5469 (last visited Jan. 22, 2007) ("We must also take steps to reduce litigation and foster a sense of cooperation between parents and schools. There is no question that the rights of children and parents must be protected. But those rights should not overshadow the primary focus of this law – to provide educational opportunities to students with special needs."); 149 Cong. Rec. H3461 (2003) (statement of Chairman Michael N. Castle, Subcomm. on Educ. Reform) ("This bill seeks to reduce litigation and restore trust between parents and school districts.").

In keeping with this focus on early resolution of IDEA disputes, the statute lays out a detailed and expansive administrative procedure that is intended to establish a cooperative relationship among all the members of a child's Individualized Education Program ("IEP") team, including the parents. 20 U.S.C. § 1415. In this way, the process encourages joint decision-making between parents and school districts and discourages a more drawn-out and expensive litigation process that not only would be destructive to this team effort, but also would be inordinately time-consuming and burdensome

– to the detriment of both parents and school districts, and more importantly to the very students who are the focus of the IDEA.

Consistent with this collaborative focus, parents are authorized to proceed on behalf of their children in these administrative efforts. 20 U.S.C. §§ 1415(f)(1)(B), (h). As detailed as the administrative procedures are, the IDEA ensures that parents are provided with ample information to help them navigate the process, and to be as informed and capable of participating in the process as any other member of the IEP team. 20 U.S.C. § 1415. Once litigation in the courts has been initiated, however, the collaborative process necessarily gives way to an adversarial process that non-attorney parents are ill-equipped to navigate on their own. At that stage, Congress recognized, the playing field has changed so substantially that it no longer makes sense to continue allowing parents to represent their children. Accordingly, although Congress authorized parents to represent their children's interests in the administrative setting, the statute is conspicuously silent with respect to such representation in litigation. *Compare* 20 U.S.C. §§ 1415(f)(1), (h), *with id.* § 1415(i)(2). In the context of an adversarial proceeding, in which specialized training and knowledge is required, the usual common-law rule operates to bar non-attorney parental representation of a child's interests. This is consistent with both the IDEA's child-centered mission and congressional concerns about imposing litigation costs and associated burdens on school districts.

B. The Absence Of An Authorization In The IDEA For *Pro Se* Suits Reflects The Considered Judgment Of Congress.

The position advocated by Petitioners not only is inconsistent with the overall purpose and structure of the statute, but it also has been thoroughly considered and rejected by Congress. Indeed, a statutory provision that would have spe-

cifically allowed the relief Petitioners seek here – the right to prosecute their child's IDEA claim *pro se* – was explicitly rejected not long before this case was commenced. That legislative judgment should not be disturbed.

In 2003, parents' groups lobbied the members and staff of the Senate Health, Education, Labor and Pensions Committee to include a provision in the IDEA amendments that would allow non-attorney parents to represent their children in court. The Committee agreed and a provision was added to Senate Bill 1248 that stated as follows:

> Parents representing their children in court.--- Subject to subsection (m), and notwithstanding any other provision of Federal law regarding attorney representation (including the Federal Rules of Civil Procedure), a parent of a child with a disability may represent the child in any action under this part in State or Federal court, without the assistance of an attorney.

S. 1248, 108th Cong. § 614(i)(4) (as reported by S. Comm. on Health, Educ., Labor & Pensions, Nov. 3, 2003); S. Rep. No. 108-185 at 225. The provision was added to the committee bill in June 2003; several months later, in November 2003, the Committee issued its report supporting the addition of this provision. S. Rep. No. 108-185 at 4-5, 42. That report makes clear the Committee was aware that most circuits had rejected *pro se* litigation under the IDEA as drafted, and that a legislative amendment would be required to pave the way for such suits:

> It is unquestioned that parents have the right to bring a [due process] complaint and participate in a due process hearing without an attorney. However, there has been disagreement as to whether a parent may, in effect, 'represent' their child in a civil action that results from an appeal of a due process hearing. The

> committee is aware of the current conflict between a number of federal circuit courts regarding this issue.

Id. at 41.[5] Moreover, the Committee specifically recognized that *pro se* representation would be inconsistent with the long-established common-law practice throughout the nation. *Id.* ("Both Federal and State laws generally prevent a non-attorney parent from representing his or her child in a court proceeding, as these laws provide that a person can only represent himself or herself, and not proceed on behalf of their minor child."). Thus, it expressly included language demonstrating this recognition, *see id.* at 225 (drafting provision to permit *pro se* suits "notwithstanding any other provision of Federal law regarding attorney representation"), and overriding all other provisions of the IDEA except § 1415(m) (providing for transfer of rights to the child at the age of majority). *See* S1248, *supra*.

Although the new *pro se* provision was included in the bill approved by the full Senate, it did not survive the Conference and thereafter was rejected by the full Congress. *See* H.R. Rep. 108-779 (2004) at 220 n.233 (Conf. Rep.) (removing language of *pro se* provision from bill). In short, the precise rule advocated by Petitioners and their *amici* here was thoughtfully considered and specifically rejected by the full Congress.[6]

---

[5] In fact, at the time the provision was added to the bill in Committee on June 25, 2003, *see* S. Rep. No. 108-185 at 4-5, the federal courts of appeals that had addressed the issue of *pro se* representation had unanimously held that it was not permitted under the statute. The First Circuit decision in *Maroni v. Pemi-Baker Regional School District*, 346 F.3d 247 (2003), created a split just before the Committee report was released in November of that year.

[6] Senators Kennedy, Harkin, and Dodd and Representatives Miller, Woolsey, and Owens, who are among the members of Congress filing an *amicus* brief in support of Petitioners in this case, participated in the conference committee that dropped the *pro se* provision, which had previ-

While the failure to amend a statute may not always be probative of legislative intent, the history of the unsuccessful *pro se* provision in this case is the best possible evidence that Congress simply did not intend to permit non-attorney parents to represent their children in court in IDEA disputes. As noted above, the Committee Report specifically acknowledged the common-law rules prohibiting such representation, as well as the majority rule (in fact, unanimous rule at the time the provision was accepted in committee) in the courts refusing to permit such representation. In this context, as this Court has just recently reaffirmed, the legislative failure to act is both relevant and susceptible to only one interpretation – that Congress did not intend to disturb the common law rule or to overturn the settled interpretation of the IDEA that was prevailing in the federal courts. *See Rapanos v. United States*, 126 S. Ct. 2208, 2231 (2006) (stating that this Court has "relied on congressional acquiescence when there is evidence that Congress considered and rejected the '*precise* issue' presented before the Court") (emphasis in original) (internal quotation marks omitted).

As explained in the next Part, this legislative judgment is consistent with sound policy under the statute: Congress understood that even more valuable school district resources would be diverted to litigation if *pro se* civil actions were allowed to proceed.

---

ously passed in the Senate, from the final version of the 2004 IDEA amendments. *See* H.R. Rep. No. 108-779 at 165-166, 262-63. These Senators and Representatives also voted in favor of the final version of the amendment (*i.e.*, the version lacking the *pro se* provision), as did all of the other members of Congress participating in this case as *amici* in support of Petitioners. *See* 150 Cong. Rec. H10022 (2004) (House Roll Call Vote Agreeing to Conference Report for H.R. 1350); 150 Cong. Rec. S11660 (2004) (Senate Unanimous Consent Vote Passing H.R. 1350).

II. PRO SE LITIGATION IN IDEA CASES IMPOSES HIGH COSTS ON SCHOOL DISTRICTS.

Public schools have diligently undertaken the great responsibilities with which they have been entrusted by the IDEA. For decades, they have scrupulously followed their statutory mandate to provide students with disabilities a FAPE.

Most public school systems, however, must operate with very limited budgets. The IDEA in particular imposes great costs on these school districts. During the 1999-2000 school year, for example, public schools spent over 20% of their general operating budgets on special education – for a total of $78.3 billion. Thomas Parrish et al., Center for Special Education Finance, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* 22 (2004). More and more, a great percentage of these costs are devoted not to education but to litigation. *See, e.g.*, Andriy Krahmal, et al., *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 Tex. J.C.L. & C.R. 201, 220 (2004). As litigation under the IDEA continues to become more prevalent, the strain on school resources can only be expected to worsen. *Id.* at 219. Allowing parents to proceed *pro se* in IDEA cases in federal courts would only exacerbate the already high costs expended by school districts on litigation and litigation-related costs. In turn, the IDEA's goal of higher quality education for students with disabilities would be undermined by the diversion of monetary and other resources that could otherwise be spent on both special and general education services. *Pro se* litigation by non-attorney parents would also result in additional incalculable costs on children, who deserve to have their claims presented in court by attorneys who are well-versed in legal proceedings.

A. Allowing *Pro Se* Litigation By Parents Under The IDEA Would Increase The Already High Cost Of Litigation And Drain Scarce Resources From The Public Schools.

The monetary costs to school districts of compliance with the IDEA are substantial. This is so even before the additional costs associated with administrative proceedings and litigation related to statutory compliance are taken into account. During the 1999-2000 school year alone, an estimated $6.7 billion was spent on assessment, evaluation, and development of IEPs for disabled children. Jay G. Chambers, et al., American Institutes for Research, *What are We Spending on Special Education Services in the United States, 1999-2000?* 14 (2004). This figure, however, does not capture additional, significant costs associated with compliance with the IDEA such as the cost in teacher and other professional time. For example, above and beyond the standard administrative work that all teachers perform, special education teachers must devote substantial time – on average, a full hour every day – to their roles as members of the teams that work together to formulate IEPs and ensure that they are carried out. *See* John A. Kirlin, et al., *Final Report on Focus Study III: The Burden of Paperwork and Administrative Duties in Special Education* 31 (2004); *see also id.* at 86 Ex. 8.2 (showing that special education teachers spent an average of 9.4 hours per week on special education paperwork and administrative tasks, and related services staff spent an average of 13.5 hours per week on these tasks).

These IEP-related costs are all incurred in furtherance of the IDEA's fundamental goal of providing a free and appropriate public education for children with disabilities. School districts are deeply concerned, however, that their ability to achieve that goal for *all* students is being increasingly undermined by the high costs of litigating against the small percentage of students who bring claims under the statute.

During the 1999-2000 school year alone, school districts spent approximately $90.2 million on mediation and administrative hearings and $56.3 million on litigation. Jay G. Chambers, et al., American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?* 5 (2003). Each case that was pending in the courts that year cost an average of $94,600 during that year alone. *Id.* at 22.[7] These costs will only rise as the volume of litigation under the IDEA continues to increase. Krahmal, *supra*, at 219-20.

Real-life examples of the severe impact such cases have on the districts against whom they are brought are legion. A single IDEA case, litigated through appeal, may rack up costs in the millions. *See, e.g.*, Kathleen Baydala, *Schools Pay $2.3 Million Legal Tab to Defend Special Education Lawsuit*, Chattanooga Times Free Press, Mar. 17, 2005, at B1 (noting that litigation costs in one IDEA case, *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004), reached $2.3 million).

Congress has demonstrated a keen awareness of the high costs associated with individual IDEA lawsuits. Senator Kay Bailey Hutchinson, for example, noted that in 2002, a year in which Congress decided to lift the cap it had imposed on attorneys' fees for lawsuits brought under the IDEA in the District of Columbia, "[a]ttorneys' fees as a percentage of total special education spending tripled to almost 6 percent, increasing by $10 million in 1 year." 150 Cong. Rec. S5351 (2004). Similarly, during the debate on the 2004 amendments to the IDEA, Senator Mike Enzi described "documented cases where schools have spent hundreds of thou-

[7] Notably, "[t]his figure does not represent the full expenditures on a litigation case from the time it was filed to its resolution. Rather the expenditure reflects what was spent on average in 1999-2000 on any given open case." *Id.*

sands of dollars battling frivolous complaints filed under IDEA." *Id.* at S5352. In particular, Senator Enzi noted "one instance of a school spending $154,000 over a 2-year period to address seven complaints from the same parent. Another school spent $195,000 on complaints from one parent." *Id.* As the Senator aptly pointed out, in his home state of Wyoming, "$154,000 is more than some school district[s'] entire special education administrative budget." *Id.*[8]

These examples, striking though they are, capture only the direct monetary costs of litigation to school districts. They do not account for the indirect costs of litigation on other educational resources.[9] Claims brought under the

---

[8] This example demonstrates that looking at the costs of litigation under the IDEA on a nationwide basis tells only part of the story. *Average* nationwide costs are high, but the costs associated with litigation in individual school districts are even higher. Even one prolonged IDEA case can have devastating effects on small communities with correspondingly small budgets.

[9] The costs of actual litigation also do not reflect the time and money that school districts must additionally spend preparing for the eventuality of litigation. Even if they have developed adequate IEPs, the failure of districts to prepare for litigation can result in adverse decisions. Indeed, in response to one such case, an article published in the *Education Law Reporter* warned that substantive legal compliance may not be enough to ensure victory in judicial proceedings and that school districts must also invest considerable time and resources specifically in preparation for litigation. Allan G. Osbourne, Jr., *Proving That You Have Provided a FAPE Under IDEA*, 151 Educ. L. Rep. 367 (2001); *see also* Kirlin, *supra*, at 75 ("Special education teachers and principals said they spent a great deal of time on documentation, noting the need to document everything related to a special education student in the event that litigation or a due process complaint was filed."). Similarly, a school district cannot assume that it will win what it views as a frivolous complaint and must prepare to litigate even these complaints to the fullest if necessary. *See* 150 Cong. Rec. at S5352 (statement of Sen. Enzi) ("Unfortunately, schools do not have the luxury of ignoring complaints, however frivolous they may be. They must assume that every complaint filed will be upheld and prepare accordingly.").

IDEA take teachers and other school district professionals away from their classrooms and offices to participate in hearings, depositions, and trials, not to mention less formal meetings with lawyers, parents, and other school personnel in relation to IDEA claims. The experience of the Council's member districts shows that, in administrative proceedings, parents who proceed *pro se* on behalf of their children often call numerous faculty members as witnesses, often unnecessarily. *See* Info. on File with Palm Beach County Schs. (demonstrating that unrepresented parents frequently call more potential witnesses than would ordinarily be the case, often listing any employee who may have had any relationship with the student or case). When regular classroom teachers become unavailable because of such litigation-related duties, schools are then forced to hire substitute teachers. *See* Info. on File with Clark County Sch. Dist. (demonstrating that the cost to the district of the hearing process in a case involving an unrepresented parent, including payment of substitute teachers, hearing officer fees, transcription, and staff time spent waiting to testify, averaged $5,000 per day). This not only inflicts yet more monetary expense, but it also imposes incalculable costs on the educational process, as substitutes are less likely to be knowledgeable about students' individualized needs and thus less able to provide high quality instruction for all children.[10] This

[10] Many children receiving services under the IDEA are placed in general education classrooms pursuant to the core statutory mission of placing children with disabilities in their least restrictive educational environment. *See* 20 U.S.C. § 1412(a)(5) ("To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."). All school children, not just children with disabilities who are directly impacted by the IDEA, there-

situation is only exacerbated when complaints under the IDEA are filed in federal courts; the IDEA requires courts to hear additional evidence at the request of a party and federal litigation typically requires a greater expenditure of time by witnesses, including preparation for, travel to and from, and attendance at depositions, trials, and other proceedings. *See* 20 U.S.C. § 1415(i)(2)(C)(ii) ("In any [civil] action . . . the court . . . shall hear additional evidence at the request of a party."); *see also* Info. on File with New York City Dep't of Educ. (stating that federal litigation is more burdensome than administrative hearings due to liberal discovery rules, including the ability to take multiple depositions and serve multiple interrogatories, and substantial motions practice).

Examples of the monetary costs of litigation also do not encompass the intangible costs of diverting resources from students' educational opportunities. Every dollar spent on litigation is a dollar diverted away from educational programs and thus away from the educational mission that is the core purpose of both the IDEA and the schools administering it. The experience of the District of Columbia school system bears this out. When the attorneys' fee cap in IDEA cases was reinstituted in the District in fiscal year 2003, public schools there saved $4.4 million. 150 Cong. Rec. at S5352 (statement of Sen. Hutchinson). "Based on those savings, DCPS was able to create 550 new classroom seats at 50 schools during the 2003-2004 school year to serve children with special needs, including children with autism, students who are hearing or vision impaired, mentally retarded, learning disabled or emotionally disabled, and early childhood special education students." *Id.*; *see also id.* (stating that savings from the fiscal year 2004 attorneys' fee cap would again be "reinvested into capacity building" and was ex-

---

fore suffer when teachers are pulled out of their classrooms for litigation-related activities.

pected to result in the creation of 450 additional classroom seats).

All of the costs detailed above are far higher when the suits are prosecuted by *pro se* litigants like Petitioners. *See, e.g.*, Resp. Br., Part II.B (discussing burdens to school district of defending this case when Petitioners were proceeding *pro se*). Even in the administrative context, where the prospect of parents proceeding *pro se* was at least contemplated by Congress, *see* 20 U.S.C. §§ 1415(f)(1), (h), proceeding against self-represented parents is more costly and time-consuming for school districts. As discussed above, school districts have found that in such proceedings, parents tend to call a multitude of witnesses, who often have little to add to the proceedings, and engage in other conduct that prolongs hearings unnecessarily. *See, e.g.*, Info. on File with Palm Beach County Schs., *supra* (unrepresented parents often call unnecessary witnesses and engage in repetitive questioning when cross-examining school district witnesses); Info. on File with New York City Dep't of Educ., *supra* (unrepresented parents often do not adhere to regulations limiting the scope of the hearing to the hearing request).

Likewise, in the litigation context, costs of *pro se* cases generally are higher, both on adverse parties and on courts, than costs in cases where both parties are represented by counsel. *See, e.g.*, *Abdul-Akbar v. Watson*, 901 F.2d 329, 332 (3d Cir. 1990) (recognizing that "the cost in time and personnel to process *pro se* . . . pleadings requires some portion of the court's limited resources and ties up these limited resources to the detriment of other litigants"); *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983) ("[T]he conduct of litigation by a nonlawyer creates unusual burdens . . . for his adversaries and the court."); *see also, e.g.*, *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Ann. Surv. Am. L. 124, 299-300 (hereinafter

"*Report of the Working Committees*") (finding that *pro se* cases "present a substantial management problem for the circuit" and "consume a significant amount of court resources").

This same general trend holds true in IDEA cases, where school districts find themselves facing much higher costs when forced to proceed against parents acting *pro se* in civil actions than they do when all litigants are represented by counsel. *See, e.g.*, *Maroni*, 346 F.3d at 258-59 (adopting rule that parents may proceed *pro se* under the IDEA but acknowledging that "[*p*]*ro se* litigants also impose unusual burdens on courts, and there is a desire to save courts and school districts from poorly drafted, inarticulate, or vexatious claims") (internal quotation marks omitted). Thus, permitting parents to prosecute claims *pro se* would frustrate Congress's stated purpose of reducing the burden of IDEA litigation on school districts, and instead further stretch the districts' already tight budgets and impede their efforts to provide a FAPE to all students with disabilities.

B. The Core Purposes Of The Statute May Be Vindicated Without Authorizing *Pro Se* Litigation In IDEA Cases.

As discussed at Part I, *supra*, Congress made a conscious decision not to allow *pro se* actions by parents under the IDEA. This conclusion not only is consistent with both the text and history of the statute, but it also safeguards the substantive rights of children with disabilities by requiring their educational interests to be represented by trained counsel who can competently navigate the legal system on their behalf. Likewise, refusing to authorize *pro se* litigation will have none of the adverse consequences that Petitioners suggest because other statutory and procedural mechanisms – including attorneys' fee provisions, regulations requiring that parents be made aware of available legal services, and district courts' ability to appoint counsel – ensure that children

with meritorious claims will not be denied access to the judicial system. In light of these existing mechanisms, most claims that are likely to be cut off by a bar on *pro se* actions by parents under the IDEA are frivolous actions.

To start, the IDEA awards attorneys' fees to prevailing parties specifically to provide sufficient incentive to counsel to prosecute meritorious claims. In enacting similar attorneys' fees provisions in other statutes, Congress recognized that "[i]n order to ensure that lawyers would be willing to represent persons with legitimate . . . grievances . . . it would be necessary to compensate lawyers for all time reasonably expended on a case." *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986) (discussing legislative history and purposes of 42 U.S.C. § 1988); *see also Hannon v. Sec. Nat'l Bank*, 537 F.2d 327, 328 (9th Cir. 1976) (noting that purpose of Truth in Lending Act attorneys' fees provision is "to facilitate private enforcement of the . . . Act"). The IDEA's attorneys' fees provision serves the same purpose, as members of Congress have acknowledged. *See, e.g.*, 150 Cong. Rec. at S5352 (statement of Sen. Hutchinson) ("The rule that allows parents to receive payment to recover attorneys' fees when they win is intended to ensure parents who may not have the means can get representation.").

In addition to the attorneys' fee provision, regulations enacted pursuant to the IDEA require that school districts provide parents filing due process complaints with information about local pro bono and low-cost legal services. 34 C.F.R. § 300.507(b). The regulations therefore assure that parents are aware of the particular resources available to them in their local communities. The need for representation in IDEA cases has thus been contemplated and provided for in the statute itself as well as in its implementing regulations, without resort to allowing parents to proceed *pro se*.

Other mechanisms outside of the IDEA equally ensure legal representation for children with meritorious claims

who do not otherwise have access to counsel. Judges currently have the power to appoint counsel in civil cases, including the power to appoint counsel for children. *See* 28 U.S.C. § 1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel."). This power is supplemented in IDEA cases by Federal Rule of Civil Procedure 17(c), which provides that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action *or shall make such other order as it deems proper for the protection of the infant or incompetent person.*" (Emphasis added.) As Rule 17(c) demonstrates, the courts are charged with looking out for children's best interests. *See also Doe v. Bd. of Educ.*, 165 F.3d 260, 264 (4th Cir. 1998) ("Indeed, courts must take special care to protect the interests of children, given that an infant is always the ward of every court wherein his rights or property are brought into jeopardy . . . .") (internal quotation marks omitted). Thus, if there are indeed meritorious cases in which parents are truly unable to obtain a lawyer despite the attorneys' fee incentives, the courts may step in to perform their traditional role of protecting children's best interests and appoint counsel.

The balance struck by these various statutes and regulations therefore works to assure competent legal representation and favors such representation exclusively over the non-attorney representation that Petitioners seek to read into the statute. This result is supported by sound policy considerations as well. A high volume of *pro se* litigation in federal courts involves claims that are borderline, if not outright, frivolous and simply have no place in the courts. *See Report of the Working Committees*, *supra*, at 299 ("The dismissal rates for *pro se* cases suggest that, in the end, the circuit's resources have often been expended on grievances that have no place in federal court."); *see also Abdul-Akbar*, 901 F.2d at 332 ("Often these litigious [*pro se*] plaintiffs are repeti-

tious, frivolous and even malicious in their pleadings."). This state of affairs is no different in IDEA cases. *See, e.g.*, 150 Cong. Rec. at S5352 (statement of Sen. Enzi) ("I am concerned about the effect frivolous lawsuits are having on the ability of our schools to provide services to special education students."); *see also, e.g.*, *Christian v. Clark County Sch. Dist.*, Nos. CV-S-04-0389 RLH (GWF), CV-S-04-0390 BES (GWF) (D. Nev., filed March 31, 2004) (unrepresented parent filed one apparently untimely district court action and another styled as a "Motion" rather than a complaint that necessitated the filing of eighteen pleadings by the school district even before discovery); Info. on File with New York City Dep't of Educ., *supra* (showing that the Department is engaged in protracted litigation with an unrepresented parent seeking a charter program for her autistic children even though hearing officers do not have the jurisdiction to order the Department to create a charter program).[11]

Given the array of options available both to parents and courts to protect a child's best interests via representation by competent counsel, it stands to reason that a parent's decision to proceed *pro se* is far more likely to arise where the claim lacks merit. And allowing parents to proceed *pro se*

---

[11] The often-frivolous nature of claims brought by parents who do not have counsel is even more clear in administrative proceedings that have not yet reached litigation. In one New York City case, a parent represented by a parent advocate rather than an attorney spent several hearings pursuing a home instruction remedy for which the child was clearly not a candidate under the applicable regulations. *See* Info. on File with New York City Dep't of Educ., *supra* (observing that when counsel was eventually retained, the suggestions made previously by the Department were adopted and the case settled). Another district has faced a claim involving an unrepresented parent's assertion that the physical size of a classroom interfered with the provision of a FAPE, requiring the district to spend time and resources addressing this non-IDEA related issue, including utilizing the expertise of the district's architectural engineers. *See* Info. on File with Clark County Sch. Dist., *supra* (106 LRP 38959).

when their claims do have merit, and they could obtain counsel but simply choose not to, benefits no one. Continuing to encourage parents to retain counsel, and allowing district courts to exercise their discretion under these existing procedures, is far preferable to a system that sanctions *pro se* representation by non-attorney parents.[12] In the end, the true result of Petitioners' proposed rule would be that school districts would be forced to spend even more resources on frequently frivolous litigation – resources that could be better directed toward creating and maintaining the educational opportunities for children with disabilities that are at the heart of the IDEA.

C. Children Would Be Adversely Affected If *Pro Se* Litigation Were Allowed Under The IDEA.

1. Allowing courts to exercise their discretion to appoint counsel is important even beyond the obvious cost savings that the district court's Rule 17 gatekeeping function would serve. It would simultaneously protect the many individual children who stand to be adversely affected by the rule Petitioners advocate.

Even well-meaning and well-educated *pro se* parties make frequent and costly mistakes when they attempt to liti-

---

[12] Advocacy groups supporting Petitioners cite various statistics to show that they have insufficient legal resources to assist every parent who wishes to pursue an IDEA claim on his or her child's behalf. *See* Amicus Br. of Autism Soc'y of Am. et al., at 7-8. These statistics, however, are misleading to the extent they imply that all requests for assistance that these organizations turned away involved meritorious claims for which counsel would have been otherwise unavailable but for the organization's ability to take the case. Rather, the fact that advocacy groups do take some cases, *in addition* to the myriad other mechanisms for obtaining counsel discussed above, simply highlights how many avenues are in fact available to non-attorney parents whose children have viable IDEA claims.

gate civil actions. As the working committees of the Second Circuit have observed:

> Although some of the individuals who proceed without counsel have either have legal training or have developed an advanced and sophisticated knowledge of litigation and the law, the overwhelming majority of *pro se* litigants are familiar with neither the intricacies of substantive law nor the procedures of federal courts. As a result, they are vulnerable to having their claims rejected and possibly to losing rights . . . .

Report of the Working Committees, *supra*, at 307; *see also* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 Am. U.L. Rev. 1537, 1559 (2005) ("Despite liberal pleading requirements, *pro se* litigants are almost unanimously ill equipped to encounter the complexities of the judicial system.") (internal quotation marks omitted); Thomas H. Boyd, *Minnesota's Pro Bono Appellate Program: A Simple Approach That Achieves Important Objectives*, 6 J. App. Prac. & Process 295, 300 (2004) ("[D]ue to their lack of legal education and experience, *pro se* litigants may focus on facts and issues that, while important to them personally, are not relevant or that interfere with or compromise the development of the evidentiary record and the resolution of the true factual and legal issues."). When children are involved, a non-attorney parent's lack of legal expertise can lead to adverse consequences, ranging from less than optimal presentation of claims to unintended waivers of the children's important, substantive rights. *See, e.g.*, *Doe*, 165 F.3d at 263 (stating that even though attorney-parent proceeding on behalf of his child in an IDEA case obtained a favorable result, had he provided state officials with timely notice of his witness list prior to the initial administrative due process hearing, all ensuing proceedings might have

been avoided); *Osei-Afriyie v. Med. College of Penn.*, 937 F.2d 876, 882 (3d Cir. 1991) (observing, when vacating judgment that children's claims were time-barred because they were improperly represented by their father proceeding *pro se*, that although the father was well-educated, "[h]e is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance ever to have any of their claims heard").

Even in this case, Petitioners made costly litigation mistakes when proceeding *pro se* that resulted in the waiver of important arguments that could have been made on their son's behalf. For example, in the district court, Petitioners did not raise the argument that the preschool Jacob attended would be an appropriate stay-put placement for him as he became old enough to transition to kindergarten; instead, they confined themselves solely to the argument that his placement should have been at another school entirely. *See Winkelman v. Parma City Sch. Dist.*, 166 Fed. Appx. 807, 810 (6th Cir. 2006). Counsel retained by Petitioners for their appeal did raise this alternative argument, but by that time it was too late, and the Sixth Circuit deemed this key argument waived. *Id.*; *see also* Resp. Br., Part.I.A.2 (discussing procedural errors made by Petitioners when acting *pro se* in companion Sixth Circuit case).

2. In addition to their lack of legal expertise, parents may be poor legal advocates for their children for the additional reason that the interests of parents and children are not always aligned.

In one case involving a member school district, a mother brought continual complaints on behalf of her son under the IDEA beginning when he first started receiving services under the statute in the sixth grade. The district was forced to engage outside counsel to handle its defense due to the amount of time its in-house counsel had been spending on these complaints. When her son was in high school, the

mother filed multiple *pro se* federal appeals regarding these complaints. *See, e.g.*, *Wright v. Clark County Sch. Dist.*, Nos. CV-S-98-171 DWH (LRL) (D. Nev., filed Jan. 30, 1998), CV-S-98-998 DWH (LRL) (D. Nev., filed July 9, 1998). Finally, after initial discovery had taken place, this litigation settled when the son turned eighteen and told his mother and the court that he did not want to pursue the matter. This child was therefore involved litigation that he did not desire for a period of years.[13]

Parents may also unnecessarily jeopardize their children's rights by proceeding *pro se* even when they have the option to retain counsel. Petitioners and their *amici* imply that parents will only proceed *pro se* in IDEA cases when they cannot afford attorneys. Although some *pro se* litigants may choose to represent themselves because they cannot afford a lawyer, others represent themselves for a wide variety of reasons, including distrust of the legal profession or the belief that they can adequately represent their own interests. Drew A. Swank, *The Pro Se Phenomenon*, 19 B.Y.U.J. Pub. L. 373, 378-79 (2005) (citing one survey in which "forty-five percent of *pro se* litigants stated that they chose to represent themselves because their case was simple" and outlining various non-financial reasons that parties choose to proceed *pro se*). Parties who proceed *pro se* on behalf of themselves can generally be assumed to have made some informed choices regarding such representation and its consequences. But in this context, involving children who are not capable of making informed decisions, or weighing the real costs and risks associated with such decisions, the Court should not

[13] Likewise, in this case, Petitioners elected to keep Jacob out of school entirely in the 2004-2005 and the current school year in favor of pursuing claims for tuition reimbursement and multiple due process complaints. Petitioners made this choice notwithstanding the repeated findings both at the administrative level and in the district court that Jacob needs opportunities for peer interactions. *See* Resp. Br. at 3-6.

adopt a rule that would give their non-attorney parents the right to choose whether or not to retain competent counsel.

III. UNDER THE SPENDING CLAUSE, CONGRESS COULD NOT HAVE IMPOSED SUCH A BURDEN ON SCHOOL DISTRICTS WITHOUT PROVIDING CLEAR NOTICE.

Consistent with the goal of not unnecessarily burdening school districts while simultaneously ensuring adequate representation of the children whose rights are at the center of the IDEA, the plain language of the IDEA compels the conclusion that parents cannot bring *pro se* actions under the Act because the statute does not grant parents either substantive rights or the right to sue *pro se* on their child's behalf. *See* Resp. Br., Parts I, II. But even if that were not clearly the case, the Spending Clause independently mandates that result. The IDEA is notably silent on the issue of *pro se* civil actions by parents under the Act, and this silence is simply an insufficient basis on which to infer that Congress intended to impose the high costs of such actions on the States.

As Spending Clause legislation, the IDEA is subject to special scrutiny by this Court.[14] *See, e.g., Arlington Central,*

---

[14] Both Petitioners and the United States assert that the Spending Clause is irrelevant to this case because it is 28 U.S.C. § 1654, which is not Spending Clause legislation, rather than the IDEA, that allows parents to proceed *pro se* in federal court. *See* Pet'r Br. at 15 n.10; U.S. Br. at 11 n.4. Section 1654, however, does not create any right of action; it merely provides that for any pre-existing rights of action, "the parties may plead and conduct their own cases personally." *See Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 581 (11th Cir. 1997) ("Section 1654 . . . is inapposite because it does not speak to the issue before us – whether Devine may plead or conduct his son's case."). The Court must look to the substance of the IDEA itself to determine whether parents have any substantive rights under the statute that would then allow them to proceed *pro se* under Section 1654, or whether any authorization exists for them to proceed *pro se* on behalf of their children. Because this case

126 S. Ct. at 2458 ("Our resolution of the question presented in this case is guided by the fact that Congress enacted the IDEA pursuant to the Spending Clause."); *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 83 (1999) (Thomas, J., dissenting) ("Because IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction.") (citation omitted). The Court therefore should be particularly hesitant to conclude that Congress intended to allow costly *pro se* litigation under this statute.

This Court has repeatedly held that when Congress enacts legislation placing conditions on the receipt of federal funds pursuant to its Spending Clause power, as it has done here, the intent to impose such conditions must be made unambiguously clear in the text of the statute itself. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). The Court emphasized in *Pennhurst* that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* Consistent with basic contract law principles, therefore, the terms of the bargain that Congress is asking the States to accept when it imposes conditions on federal funding must be made clear – if they are not, the States cannot make a knowing, fully informed decision whether to accept the deal they have been offered. *See id.*

Against the backdrop of this general Spending Clause jurisprudence, this Court made clear in *Arlington Central* that any inquiry into whether the IDEA is sufficiently clear as to the conditions placed on federal funding under it must be

---

turns on the interpretation of the IDEA, not Section 1654, the Spending Clause is unquestionably implicated.

undertaken "from the perspective of a state official who is engaged in the process of deciding whether the State should accept IDEA funds and the obligations that go with those funds." 126 S. Ct. at 2459. Thus, in that case, the Court asked the crucial question "whether such a state official would clearly understand that one of the obligations of the Act is the obligation to compensate prevailing parents for expert fees." *Id.* Here, the crucial question is whether such a state official would clearly understand that one of the obligations of the Act is paying the high costs, and assuming the attendant burdens, of conducting federal court litigation against non-attorney parents bringing IDEA lawsuits *pro se*. The answer is plainly no.

First, the text of the IDEA is completely silent regarding the existence of any substantive rights for parents under it that would allow them to bring *pro se* actions on behalf of themselves or any provision that would indicate a parental right to bring a *pro se* civil action on behalf of minor children. *See* 20 U.S.C. § 1415(i)(2) (creating right to bring a civil action without specifying that *pro se* civil actions may be brought on behalf of minor children); *see also* Part I, *supra*; Resp. Br., Parts I, II (demonstrating that parents have neither substantive rights under the statute nor the right to proceed *pro se* on their child's behalf). In light of the clear statement requirement for Spending Clause legislation, if Congress intended for school districts to bear the increased costs of *pro se* litigation, *see* Part II, *supra*, as a condition for receiving federal funding under the IDEA, it was required to make that intent unambiguous in the text of the statute itself. The plain language of this statute provides school district officials with no notice at all, much less the clear notice required in Spending Clause legislation, that such litigation might occur under the IDEA. Indeed, if the statute were clear, six of the seven courts of appeals to have addressed

this issue surely would not have concluded that the parents may not bring *pro se* actions under the IDEA.

Second, not only has Congress not clearly expressed an intent to allow *pro se* civil actions under the IDEA, but in fact it has expressed just the opposite intent. As explained above, Congress made a conscious decision not to include in the final statute a provision that would have explicitly allowed for such actions. *See* Part I.B, *supra*. The consideration and rejection of that provision would have signaled to state officials determining whether to accept funds under the IDEA that Congress was satisfied with the overwhelming rejection of such suits by the federal courts, and did not intend to permit *pro se* civil actions by parents under the IDEA. School district officials are also undoubtedly aware of Congress's general effort to reduce administrative and litigation-related burdens under the Act, *see Schaffer*, 126 S. Ct. at 535, and this awareness makes it all the more likely that they would conclude that Congress did not intend to allow costly *pro se* litigation. At worst, the legislative history of the *pro se* provision would have rendered the issue of Congressional intent in this area highly ambiguous. But as discussed above, ambiguity cannot be condoned in the context of Spending Clause legislation when state officials must be afforded a fair opportunity to weigh the trade-offs associated with accepting conditional federal funding.

Third, a school district official looking at the structure of the IDEA as a whole would not be on clear notice of any intent on the part of Congress to allow *pro se* civil actions by parents under the statute. Congress included an authorization for parents to proceed without a lawyer on behalf of their minor children in administrative proceedings under the IDEA. *See* 20 U.S.C. §§ 1415(f)(1) (stating, *inter alia*, that "the parents . . . shall have an opportunity for an impartial due process hearing"), (h) (providing that parties to due process hearings have the right to be accompanied by coun-

sel). Given the contrast between this language contemplating proceedings without attorneys in the administrative context and the complete silence on that issue in the provision governing civil actions, a school district official undertaking a common-sense reading of the statute would naturally conclude that if *pro se* civil actions were permissible, Congress would have made that condition explicit as well.

Finally, imposing an additional condition for the receipt of federal funds – bearing the high costs of litigation against *pro se* parents in federal courts – on school districts that receive money under the IDEA is particularly inappropriate here because it would abrogate the clear, long-standing rule that a person cannot bring a *pro se* action on behalf of another. *See* 28 U.S.C. § 1654 ("the *parties* may plead and conduct *their own cases* personally or by counsel") (emphases added); *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982) ("The federal courts have consistently rejected attempts at third-party lay representation.") (citations omitted); *cf. United States v. Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law.").

For all of these reasons, Petitioners' interpretation of the IDEA is foreclosed by the clear notice requirement of the Spending Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

PAMMELA QUINN
SHANNON PAZUR
NILAM A. SANGHVI
KIRSTIN KLINGSICK*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*Admitted only in Illinois

JULIE WRIGHT HALBERT
(Counsel of Record)
COUNCIL OF THE GREAT CITY SCHOOLS
1301 Pennsylvania Ave., N.W., Suite 702
Washington, D.C. 20004
(202) 394-2427

Attorneys for Amicus Curiae

Dated: January 23, 2007

966 D

No. 05-983

Supreme Court, U.S.
FILED
DEC 15 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, *et al.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES INC., THE ARC OF THE UNITED STATES, TASH, NATIONAL DOWN SYNDROME CONGRESS, PUBLIC COUNSEL, THE ROCKY MOUNTAIN CHILDREN'S LAW CENTER, THE SUPPORT CENTER FOR CHILD ADVOCATES, CHILDREN'S LAW CENTER OF MINNESOTA, THE NORTHWESTERN UNIVERSITY SCHOOL OF LAW'S BLUHM LEGAL CLINIC, THE CHILDREN'S LAW CENTER OF MASSACHUSETTS, AND OKLAHOMA LAWYERS FOR CHILDREN IN SUPPORT OF PETITIONERS

LYNN S. PREECE
Counsel of Record
ERIN MCCLOSKEY MAUS
ANGELA C. VIGIL
SHOSHANA ISAAC
MARIANNA LVOVSKY
LIQUITA L. THOMPSON
AMBER HOFFMAN
KELLY GOING
BAKER & MCKENZIE LLP
130 E. Randolph Drive
Suite 3500
Chicago, IL 60601
(312) 861-8022

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

Table of Cited Authorities iii

Interest of Amici Curiae 1

Summary of Argument 4

Argument 6

I. Parents Possess All Rights Granted Under IDEA and Can Pursue Them *Pro Se* 6

II. Prohibiting Parents of Children with Disabilities Who Are Unable to Obtain a Lawyer from Appearing *Pro Se* in Federal Court Denies Parents the Ability to Equally Exercise Their Rights Under the IDEA 9

A. Families of children with disabilities are over-represented among poor populations. 9

B. Basic statutory rights and constitutional principles are ignored disproportionately for poor people if parents are not allowed to appear *pro se* in federal court to pursue FAPE. 13

III. The Substantive/Procedural Right Distinction Developed in Some Circuits Is Contrary to the Plain Language of the Statute, Was Neither Envisaged Nor Intended by Congress and Causes Disastrous Effects to Parents 14

Contents

Page

A. The IDEA's plain language establishes that parents have both procedural and substantive rights 14

B. Congress intended no distinction between substantive and procedural rights as evidenced by the IDEA's failure to make such a distinction for administrative hearings 16

C. The faulty substantive/procedural distinction some circuits have drawn should be rejected by this Court to assure parents are not penalized for engaging in unauthorized practice of law. 17

D. Limiting or preventing parents from proceeding *pro se* will effectively deny access to federal courts in IDEA cases and allow administrative decisions to be final, rather than rendering courts the consistent and final arbiters of IDEA claims 19

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

CASES

Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) ... 6, 21

Board of Education v. Illinois State Board, 41 F.3d 1162 (7th Cir. 1994) 21

Board of Education v. Kelly E. ex rel. Nancy E., 207 F.3d 931 (7th Cir. 2000) 16

Brown v. Board of Education, 347 U.S. 483 (1954) 13

Collinsgru v. Palmyra Board of Education, 161 F.3d 225 (3d Cir. 1998) 14, 15, 17

Devine v. Indian River County School Board, 121 F.3d 576 (11th Cir. 1997) 9, 10, 17

Goss v. Lopez, 419 U.S. 565 (1975) 13

Griffin v. Illinois, 351 U.S. 12 (1956) 13

Honig v. Doe, 484 U.S. 305 (1988) 6

Hunger v. Leininger, 15 F.3d 664 (7th Cir. 1994) .. 20

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 13

Maroni v. Pemi-Baker Regional School District, 346 F.3d 247 (1st Cir. 2003) ..... *passim*

Cited Authorities

Page

Mayer v. Chicago, 404 U.S. 189 (1971) 13

Morrissey v. Brewer, 408 U.S. 471 (1972) 13

Mosely v. Board of Education of the City of Chicago, 434 F.3d 527 (7th Cir. 2006) 17, 18

Mullane v. Central Hanover Bank Trust Co., 339 U.S. 306 (1950) 13

Murphy v. Arlington Central School District Board of Education, 297 F.3d 195 (2d Cir. 2002) 17, 18

Murray v. Montrose County School District, 51 F.3d 921 (10th Cir. 1995) 21

Ojai Unified School District v. Jackson, 4 F.3d 1467 (9th Cir. 1993) 20

Schaffer v. Weast, 546 U.S. 49, 126 S. Ct. 528 (2005) 10

Susan N. v. Wilson School District, 70 F.3d 751 (3d Cir. 1995) 20

Tokarcik v. Forest Hills School District, 665 F.2d 443 (3d Cir. 1981) 20

Valerie J. v. Derry Cooperative School District, 771 F. Supp. 483 *order clarified*, 771 F. Supp. 492 (D.N.H. 1991) 21

Wenger v. Canastota Central School District, 146 F.3d 123 (2d Cir. 1998) 17

Cited Authorities

Page

DOCKETED CASES

Guiteras v. Central Bucks School District, et al., Civil Action No: 2:05-cv-01313-TON (March 31, 2005 E.D. Pa) 10

Kaseman v. District of Columbia, et al., Civil Action No: 1:03-cv-01858 (Aug. 02, 2004 D.D.C.) 10

FEDERAL STATUTES

20 U.S.C.A. § 1400 et seq. (West 2000 & Supp. 2006) 4

20 U.S.C.A. § 1400(c)(2) 7

20 U.S.C.A. § 1400(c)(3) 7

20 U.S.C.A. § 1400(c)(5) 7, 16

20 U.S.C.A. § 1400(d)(1)(B) 7

20 U.S.C.A. § 1401 13

20 U.S.C.A. § 1401 (9) 8

20 U.S.C.A. § 1401 (23) 7

20 U.S.C.A. § 1401 (24) 8

20 U.S.C.A. § 1401 (25) 8

20 U.S.C.A. § 1401 (29) 8

Cited Authorities

	Page
20 U.S.C.A. § 1406(b)	8
20 U.S.C.A. § 1414	8, 13
20 U.S.C.A. § 1415	8, 13, 19
20 U.S.C.A. § 1415(h)	17
20 U.S.C.A. § 1415(i)	16
20 U.S.C.A. § 1415(i)(2)	20
20 U.S.C.A. § 1415(i)(2)(A)	19
20 U.S.C.A. §1415(i)(3)(B)	15
28 U.S.C.A. § 1654 (West 2006)	7
Fed. R. Civ. P. 17(a)	7
Fed. R. Civ. P. 17(c)	10

OTHER AUTHORITIES

132 Cong. Rec. 17610 (1986)	12
Income Level for Individuals Eligible for Assistance, 71 Fed. Reg. 5,012 (2006)	12
Jose Blackorby, et al., *Wave 1 Wave 2 Overview*, (August 2004), http://www.seels.net/designdocs/w1w2/SEELS_WIWS_complete_report.pdf	11

Cited Authorities

Page

Albert H. Cantril, American Bar Association, *Agenda for Access: The American People and Civil Justice*, (1996), http://www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf. 12

M. Brendhan Flynn, *In Defense of Maroni: Why Parents Should Be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L.J. 881 (2005) 9

Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 Ct. Rev. 8 (2003) 12

Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU Educ. & L. J. 519 (2003) 10

Adam Liptak, *Nonlawyer Father Wins His Suit over Education, and the Bar Is Upset*, N.Y. TIMES, May 6, 2006 9

Lewis Powell, *The Response of the Bar*, 51 A.B.A.J. 751 (1965) 14

Mary Wagner, *The Children We Serve: Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households*, http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf 11

INTEREST OF AMICI CURIAE

The *Council of Parent Attorneys and Advocates Inc.* (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes the key to effective educational programs for children with disabilities lies in collaboration between parents and educators as equal parties. To this end, COPAA does not undertake individual representation for children with disabilities but provides training and resources for advocates and attorneys to help each child obtain the free appropriate public education guaranteed by the Individuals with Disabilities Education Act (IDEA).[1]

The Arc of the United States (The Arc) is the oldest and largest national organization for people with intellectual disabilities (mental retardation) and related developmental disabilities and their families. It was founded in 1950 by parents and other concerned individuals, primarily to procure services for children with disabilities who were denied a public school education. Today, The Arc works to ensure that the estimated 7.2 million Americans with intellectual disabilities and related developmental disabilities have the services they need, including approximately 750,000 students with intellectual disabilities who are entitled to FAPE, in order to grow, develop and live in communities across the nation.

TASH is an international membership organization of people with disabilities, their family members, other

---

1. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court in accordance with Supreme Court Rule 37.3(a). No counsel for either party has authored this brief, in whole or in part, and no person or entity other than Amici Curiae, its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

advocates and people who work in the disability field. TASH has chapters throughout the United States and members from thirty-eight countries worldwide.

National Down Syndrome Congress (NDSC) is a membership-based organization, founded in 1972, of family members, friends, self-advocates and professionals pursuing equal rights and opportunities for persons with Down Syndrome. NDSC provides information, advocacy, support and encouragement throughout the country and internationally. NDSC works with its members on education issues, including working with parents to have their children included in regular education classes with age appropriate peers, and on other IDEA-related issues.

Public Counsel is the nation's largest public interest pro bono law firm. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal services to indigent and underrepresented children and families throughout Los Angeles County, ensuring that other community-based organizations serving this population have legal support, and by mobilizing pro bono resources. Limited resources prevent Public Counsel from providing direct legal representation to all families challenging inadequate special education services. In the majority of cases, Public Counsel provides parents training and resources to assist them in advocating for their children on their own.

The Rocky Mountain Children's Law Center is a Colorado-based nonprofit that saves the lives of abused and neglected children through zealous legal representation, mentoring, therapy, education and legislative reform. It works to ensure that child clients are safe and receive individualized, sensitive care from a legal advocate.

The Support Center for Child Advocates (Child Advocates) provides legal assistance and social service advocacy to abused and neglected children in Philadelphia, including hundreds of children with disabilities. Child Advocates witnesses a range of systemic problems affecting children served by public agencies and school systems and promotes collaborative, multi-disciplinary casework and solutions to recurrent problems.

Children's Law Center of Minnesota (CLC), a nonprofit organization, opened in 1995 and is the only legal center for children in Minnesota. CLC's mission is to promote the rights and interests of all children—especially children of color and children with disabilities—in the judicial, child welfare, health care and education systems. CLC provides direct representation to children and participates in statewide efforts to reform and improve child welfare, juvenile justice and education systems.

The Northwestern University School of Law's Bluhm Legal Clinic has represented poor children in juvenile and criminal proceedings since 1969. The Children and Family Justice Center (CFJC) was established in 1992 at the Clinic as a legal service provider for children, youth and families and as a research and policy center. CFJC represents children in juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum cases, and appeals.

The Children's Law Center Of Massachusetts (CLCM), founded in 1977, is a private, non-profit, legal advocacy and resource center providing direct representation to low income children in Eastern Massachusetts, and technical assistance and training to lay and professional communities in New England on issues affecting children's education, civil rights, custody, health and welfare. CLCM provides direct services to children from diverse racial and ethnic backgrounds.

Oklahoma Lawyers for Children (OLFC) works to protect children and promote their health and well-being by providing them the full benefit of legal counsel and other services. OLFC's purpose is to use the time, talent and resources of qualified pro bono lawyers and others to represent children in court.

Amici have a common interest in this case: concern over the abridgment of rights granted to parents under the IDEA to appear *pro se* in IDEA cases in court proceedings. Preventing parents from proceeding *pro se* obviates the guarantees of the IDEA. The inability of many parents to retain counsel in IDEA court proceedings effectively prevents both parents and children from obtaining the rights guaranteed to them under the IDEA.

SUMMARY OF ARGUMENT

Amici bring to this Court the unique perspective of parents of children with disabilities in legal disputes with public schools about their children's education, the children themselves and advocates for these children. Amici know the challenges faced by children with disabilities whose educational success depends on the right to secure a free appropriate public education (FAPE) promised by the Individuals with Disabilities Education Act (IDEA). 20 U.S.C.A. § 1400 et seq. (West 2000 & Supp. 2006). Amici have first-hand, practical insights to share with this Court as to how denying parents the right to appear *pro se* has a negative impact on children with disabilities.

Denying parents of children with disabilities access to courts unless they can find and/or afford a lawyer effectively obviates the rights, promises and protections of the IDEA and subverts the statute's purposes. Plainly, the IDEA is not designed or intended to limit access to justice to only those

fortunate enough to afford it. Nor was the IDEA ever intended to deny children with disabilities the right to FAPE—the fundamental guarantee embodied in the IDEA—because of the shortage of qualified lawyers willing and able to accept unprofitable IDEA cases. Access to justice must come at the moments when a child needs it most during his or her educational years or it has no meaning. It cannot wait until the child reaches the age of majority after losing years of developmental progress, thus mooting the capacity to mitigate educational deficiencies and eliminating a child's chances for educational success. By the time the law allows a child to appear on his or her own behalf at age eighteen, significant educational potential has been lost, often irreversibly.

Denying parents the right to appear *pro se* in federal court to protect the substantive rights guaranteed to them and to their children in the IDEA is inconsistent with the most careful and faithful accounting of the IDEA's principles as articulated by the First Circuit in *Maroni v. Pemi-Baker Regional School District*, 346 F.3d 247 (1st Cir. 2003). Amici agree with the briefs of Petitioners and the Solicitor General and Department of Education, which establish that the plain language of the IDEA makes parents of children with disabilities aggrieved parties in IDEA decisions affecting their children. This plain language is fully corroborated by legislative intent and supported by the sound public policy underpinning the IDEA. This policy is consistent with the experience of Amici—that parents of children become parties aggrieved when their own children are aggrieved. These words, "parties aggrieved," have more than just a technical, legal meaning. The aggrievement is real and meaningful to Amici and the families they represent across the nation.

Upholding the Sixth Circuit's decision would make a child's age or his or her parents' financial status the touchstones for accessing the court system to protect the child's right to FAPE. Such a decision would produce disastrous and unintended consequences including, most fundamentally, a potentially absolute barrier to entry to the federal court system for poor children, the tenuous prosecution of parents for the unauthorized practice of law and the promotion of administrative hearing officers to final arbiters of IDEA disputes without court review. These unintended consequences are neither statutorily authorized nor Congressionally intended and should be avoided.

ARGUMENT

I. Parents Possess All Rights Granted Under IDEA and Can Pursue Them *Pro Se*.

Children with disabilities and their parents work in a collaborative manner with schools to secure the special education services the children need. To effectuate the words, spirit and purpose of the IDEA, this Court has recognized that parental involvement is integral to the protection of a child's rights under the IDEA. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982). The unique bond between child and parent clearly results in the parent sharing many of the child's experiences, including educational ones. The IDEA's statutory structure recognizes this relationship by making parents an integral member of the educational team at all stages of the child's education. When disputes arise about the child's education during this collaborative process, parents are entitled to advocate under the IDEA by filing an action in federal court against any inappropriate decision which threatens access to FAPE. *Honig v. Doe*, 484 U.S. 305, 311-12 (1988). Nothing in the IDEA suggests that this parental involvement, integral to the protection of the child's rights, should stop at the courthouse door if he or she cannot afford to enter.

The text and purposes of the IDEA demonstrate Congress's intention to bestow IDEA rights on both parents and children. The briefs of Petitioners and of the Solicitor General in support of the petition for certiorari establish that the clear statutory language of the IDEA confirms that parents possess all procedural and substantive rights granted under the IDEA. Because they possess such rights, they are entitled under the IDEA and 28 U.S.C.A. § 1654 (West 2006) to proceed *pro se* on their own behalf to enforce their own rights.[2]

Consistent with the practice of parents and school districts in special education meetings and administrative hearings, the overall statutory scheme of the IDEA is replete with references to the role and rights of parents. Indeed, there is no essential point in the statutory scheme that leaves parents out. In its findings, Congress acknowledged the economic and other hardships parents have experienced in order to obtain an appropriate education for their children with disabilities. 20 U.S.C.A. § 1400(c)(2), (3), (5). In the statement of purposes, Congress noted that the statute ensures the protection of both "the rights of children with disabilities and parents of such children." *Id.* § 1400(d)(1)(B). Congress included definitions of "parent," "parent organization," and "parent training and information center." *Id.* §§ 1401 (23),

2. The rights of parents and children in the IDEA are co-extensive. The IDEA's statutory structure establishes that a parent is a party authorized to act for the benefit of his or her child, thus allowing the parent to also sue in his or her own name. Fed. R. Civ. P. 17(a) (providing that "a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought.") The IDEA treats parents as members of the educational team, identifying throughout the statute the parent and school district as the parties with authority to act. These statutory references not only support the fact that a parent is an aggrieved party, they also require parents to embody the role as advocates "for the benefit of another," in this case, their child with a disability.

(24), (25). Congress also mandated that an appropriate education be provided to children with disabilities at "no cost to parents." *Id.* §§ 1401 (9), (29). Congress placed parents in a prominent role in the creation of an Individualized Education Program for each child with a disability. *Id.* § 1414. The IDEA forbids narrowing by rule the rights of parental consent to the specific programs developed. *Id.* § 1406(b). Congress required states to reimburse parents for private school tuition if such placement is the appropriate educational setting under the IDEA. *Id.* § 1414. The statute goes to great lengths to provide an extensive set of procedural safeguards to be exercised by parents in order to protect the substantive rights provided to children in the IDEA. *Id.* § 1415.

The role of parental advocacy is essential to under-resourced parents for whom the IDEA is the only tool available to ensure their children receive FAPE. Congress included parents in every critical point of the statutory scheme. To do otherwise would unnaturally dismantle rights which are inherently married and interdependent. The IDEA's numerous provisions that contemplate and confirm that the rights and responsibilities of parent and child are co-extensive, demonstrate the key partnership of parents in the process of appropriately educating children with disabilities. This includes the critical ability for parents to advocate for their children's rights in court.

II. Prohibiting Parents of Children with Disabilities Who Are Unable to Obtain a Lawyer from Appearing *Pro Se* in Federal Court Denies Parents the Ability to Equally Exercise Their Rights Under the IDEA.

A. Families of children with disabilities are over-represented among poor populations.

That parents may pursue both their procedural and substantive rights under the IDEA is consistent with the reality that poor people are negatively affected by a decision to the contrary. M. Brendhan Flynn, *In Defense of Maroni: Why Parents Should Be Allowed to Proceed Pro Se in IDEA Cases*, 80 Ind. L J. 881, 892 (2005). Many mothers and fathers of children with disabilities are forced to proceed *pro se* because they either have no money or have run out of money to pay for a lawyer. *See, e.g., Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 578 n.5 (11th Cir. 1997) (per curiam).[3] Often, these parents are also unable to find a lawyer with both the expertise and the willingness to work for free.[4]

---

3. The Winkelman family's annual income, for example, is less than $40,000 a year. They have no savings and a monthly mortgage payment of $1,300. *See* Petr.s' Br. Cert. at fn 2. According to Mrs. Winkelman, one lawyer asked for a fee of $2,600 to be paid biweekly in order to represent Jacob in the appeals court below, or a payment every two weeks of twice the amount the family paid every month for their mortgage. Adam Liptak, *Nonlawyer Father Wins His Suit over Education, and the Bar Is Upset*, N.Y. TIMES, May 6, 2006, at A8.

4. COPAA conducted an informal survey of its member attorneys to determine the hourly rate, retainer and total matter cost for handling an IDEA case. These results indicate that attorneys practicing in this area typically charge anywhere from $150 an hour to $450 an hour, depending on experience. The survey results also indicate that the majority of these practitioners require their clients

(Cont'd)

The decision below precludes federal court review of IDEA claims for those parents unable to pay for qualified counsel while allowing those who can afford a lawyer to proceed unimpeded.

Approximately seven million school-aged children with disabilities currently are eligible for services under the IDEA. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 531 (2005) ("As of 2003, the Act governed the provision of special education services to nearly 7 million children across the country.") All of them must proceed in court through a representative, next friend or guardian *ad litem*, which typically is their parent. Fed. R. Civ. P. 17(c). Only a fortunate minority have attorney parents who can plead their case in federal court. *See Devine*, 121 F.3d at 581 n.18. For the majority of parents who struggle to ensure their children receive FAPE, "[a]rdor in the face of large attorneys' bills is naturally tempered." Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU Educ. & L. J. 519, 547 (2003).

As stated in Amici's prior brief in support of certiorari, special education disabilities have long been linked to poverty and minority status, making poor families disproportionately affected by the Sixth Circuit's decision. Amicus Br. Cert. at

(Cont'd)
to pay a retainer averaging $3,000, with some requiring retainers as high as $10,000. A review of the survey results and a random sampling of requests for fees filed in federal court in IDEA cases reveal that the total matter cost for practitioners handling IDEA cases may range from $10,000 to greater than $100,000. *See, e.g.*, Compl. filed in *Guiteras v. Central Bucks School Dist., et al.*, Civil Action No: 2:05-cv-01313-TON (March 31, 2005 E.D. Pa); *see also* Order granting attorneys' fees in *Kaseman v. Dist. of Columbia, et al.*, Civil Action No: 1:03-cv-01858, (Aug. 02, 2004 D.D.C.). A declaration of A. Nelson from COPAA on the fee survey is on file with counsel of record.

7-9. Amici put forth striking evidence taken from a Department of Education survey showing that a higher percentage of lower income families have children with disabilities than families in the general population, including a disproportionate representation of certain minorities in special education among elementary and middle school students. *Id.* at 8. In this study (known as Wave 1), thirty-six percent, or over two million, children with disabilities in the year 2000 belonged to families earning less than $25,000 per year, with approximately twenty-four percent living in poverty. *See* Mary Wagner, *The Children We Serve: Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households*, *http://www.seels.net/designdocs/*SEELS_ Children_ We_ Serve_ Report.pdf at 28-29, Ex. 3-10. Over two thirds (67.6%) of school aged children with disabilities, or more than 4.5 million children, were members of families with an annual income of less than $50,000. *Id.*

A comparison of Wave 1 and a follow up survey known as Wave 2 demonstrates that the situation did not improve for poor families of children with disabilities over the two years between surveys. *See* Jose Blackorby, et al., *Wave I Wave 2 Overview*, (August 2004), *http://www.seels.net/designdocs/w1w2/*SEELS_ W1W2_complete_report.pdf at 2-6. Although there were slightly fewer children with disabilities (63%) in families earning less than $50,000 a year, the Wave 2 authors concluded, "[t]hese changes are not sufficient to cause a meaningful decline in the percentage of students with disabilities who live in poverty; 21% are living in poverty in Wave 2, a significantly higher rate than among children in the general population (16% US Department of Commerce, 2002)." *Id.* at 2-5. In fact, in the two years between collection of the Wave 1 and Wave 2 information, ". . . eight percent of all households who were in the middle income category [$25,000-$50,000] in Wave 1, are among the ranks of the families in poverty in Wave 2." *Id.* at 2-6.

Ironically, for those families who are eligible for public legal assistance,[5] the Legal Services Corporation estimates that four out of every five who apply for such assistance are turned away because there are not sufficient resources to handle their cases. *See* Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 Ct. Rev. 8, 8 (2003). Families above the poverty line living on less than $50,000 per year, like the Winkelman family who do not qualify for subsidized legal assistance, "seldom are able to afford help from the private bar." Albert H. Cantril, American Bar Association, *Agenda for Access: The American People and Civil Justice*, (1996), http://www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf.

However valid the grounds are for a federal action, if parents cannot proceed *pro se*, then "such an outcome subverts Congress's original intent [in the precursor statute to the IDEA] . . . that due process procedures, including the right to litigation if that became necessary, be available to all parents." *Maroni*, 346 F.3d at 258, (*citing Handicapped Children's Protection Act of 1986*, S. Rep. No. 99-112, at 2 (1986)). As so aptly stated by then Congressman now Senator Jim Jeffords: "Should the ability to pay for the services of an attorney determine which students have a better chance of receiving appropriate services and placement because they can afford an attorney to represent them at various stages of the administrative appeal and in litigation? I think we would all agree the answer is a resounding 'no'." 132 Cong. Rec. 17610 (1986).

---

5. A family of four living in the lower 48 states is entitled to legal assistance only if the families earn $20,750 per annum or less. *See Income Level for Individuals Eligible for Assistance*, 71 Fed. Reg. 5,012 (2006).

B. Basic statutory rights and constitutional principles are ignored disproportionately for poor people if parents are not allowed to appear *pro se* in federal court to pursue FAPE.

As this Court has recognized, education is "perhaps the most important function of state and local governments," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), and implicates both a liberty interest and a property interest under the U.S. Constitution. *See Goss v. Lopez*, 419 U.S. 565, 576 (1975). Therefore, education cannot be taken away from a child without some measure of due process. *Id.* At its most basic, this due process right requires notice and an opportunity to be heard. *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (noting that a state cannot "bolt the door to equal justice"). The IDEA embodies the liberty and property interests a child has in an education as FAPE. That FAPE cannot be taken away without due process is a principle manifested in the IDEA, where Congress makes clear that a school cannot unilaterally change a child's placement, refuse necessary services, or select a placement that does not provide FAPE without affording the child *and his parents* the right to challenge those decisions. *See* 20 U.S.C.A. §§ 1401, 1414, 1415 (emphasis added).

A critical issue, therefore, is what constitutes an opportunity to be heard. *See, e.g., Goss*, 419 U.S. at 577 ("Once it is determined that due process applies, the question remains what process is due." *citing Morrissey*, 408 U.S. at 481). The touchstone of due process is access. Without access, there is no opportunity to redress the deprivation of education without due process of law. *See M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (parents must be afforded access to the courts regardless of financial resources); *Mayer v. Chicago*, 404 U.S. 189, 193-94 (1971); *Mullane v. Cent. Hanover Bank Trust Co.*, 339 U.S. 306, 314 (1950) (finding that the right

to due process only exists when an individual can choose for himself whether to contest a determination against his interest).

Access to justice does not and cannot mean merely that parents know only where the courthouse doors are located. Rather, they must be permitted to enter, regardless of their financial status, to enable meaningful protection of the right to FAPE guaranteed to their children with disabilities. Conditioning the right to be in federal court on the ability of a parent to either pay for or find a qualified lawyer to act *pro bono* will wholly defeat a child's right to an education.[6]

III. The Substantive/Procedural Right Distinction Developed in Some Circuits Is Contrary to the Plain Language of the Statute, Was Neither Envisaged Nor Intended by Congress and Causes Disastrous Effects to Parents.

A. The IDEA's plain language establishes that parents have both procedural and substantive rights.

As correctly found by both the First Circuit in *Maroni*, and by Judge Roth in her carefully reasoned dissent in *Collinsgru v. Palmyra Board of Education*, 161 F.3d 225, 237-38 (3d Cir. 1998), parents can pursue both procedural

---

6. In the words of former Justice Lewis Powell,

> [e]qual justice for all man is one of the great ideals of our society. This is the end for which our entire legal system exists. It is central to that system that justice should not be withheld or denied because of an individual's race, his religion, his beliefs or his station in society. We also accept as fundamental that the law should be the same for the rich and the poor.

See Lewis Powell, *The Response of the Bar*, 51 A.B.A.J. 751 (1965).

and substantive IDEA rights *pro se*. *See Maroni*, 346 F.3d at 250-58. The correctness of this approach is confirmed by this Court's observation that the IDEA's protections are based on "the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much, if not all of what Congress wished in the way of substantive content." *Rowley*, 458 U.S. at 206. This artificial distinction between procedural and substantive rights is thus inimical to the meaning and purpose of the IDEA. *See id.*

Nowhere in the IDEA is there even a suggestion that Congress intended to limit parents to procedural rights for the purposes of judicial review.[7] Even the majority in *Collinsgru* admitted that

> [s]ome of . . . [the IDEA] language can be read to suggest that Congress intended parents and children to share the underlying substantive right—that is, that Congress meant both to give children a substantive right to an appropriate education and to give their parents the substantive right to have their children receive an appropriate education.

161 F.3d at 254. Because parental rights are co-extensive with the rights of their children, it follows that if children possess both, parents possess both. Congress emphasized this interconnectivity when it found that "the education of children with disabilities can be made more effective by . . .

---

7. For example, the rules for parental recovery of attorney's fees for IDEA litigation do not differentiate substantive rights from procedural rights but address parental rights as a whole. *See* 20 U.S.C.A. §1415(i)(3)(B) (referring to the prevailing party "who is the parent of a child with a disability" without limiting the grounds on which the parent may prevail).

strengthening the role and responsibility of parents." 20 U.S.C.A. § 1400(c)(5).[8]

B. Congress intended no distinction between substantive and procedural rights as evidenced by the IDEA's failure to make such a distinction for administrative hearings.

It is undisputed that parents possess both procedural and substantive rights of their own at the administrative stage of IDEA proceedings. None of the provisions of the IDEA "regarding the right of parents to seek relief in administrative or judicial hearings draws a distinction between substantive and procedural rights." *Maroni*, 346 F.3d at 254. Parents have been held to be within the definition of a "party aggrieved" for the purposes of administrative appeals from due process hearings. *See id.* at 251-52; *Bd. of Educ. v. Kelly E. ex rel. Nancy E.*, 207 F.3d 931, 935 (7th Cir. 2000). There is no reason why parents' rights should be reduced when they seek to enforce rights in a judicial, rather than in an administrative context.

The term "parties aggrieved," which includes parents for the purposes of administrative appeals, is identical to the definition used in 20 U.S.C.A. § 1415(i), which addresses the parties in the context of judicial review. *See Maroni*, 346 F.3d at 252 ("If parents are 'parties aggrieved' by due process hearings when seeking to appeal to a state administrative agency, then, logically, they are also parties aggrieved by due process hearings when seeking judicial review."); *see also* 20 U.S.C.A. § 1415(i).

---

8. Under the IDEA's predecessor statute, the Education for All Handicapped Children Act (EHA), courts have "almost uniformly permitted parents to sue *pro se*" without distinguishing between substantive and procedural rights. *Maroni*, 346 F.3d at 250 (internal citations omitted).

Practically speaking, the administrative appeals and judicial review process and purpose are extremely similar. A party in a due process hearing (including a parent representing himself or herself *pro se*), has the right to present evidence, confront and cross examine witnesses and compel testimony. 20 U.S.C.A. § 1415(h). Moreover, any party seeking review of an administrative decision or due process hearing outcome by a federal court would, by definition, be asking the court to consider the same rights, procedural or substantive, that were at issue in the earlier hearings or administrative appeals. If the parents may "pursue substantive claims . . . at due process hearings, they should be able to pursue substantive claims when they are aggrieved by the outcome of the due process hearings at which they presented these claims." *Maroni*, 346 F.3d at 255.

C. The faulty substantive/procedural distinction some circuits have drawn should be rejected by this Court to assure parents are not penalized for engaging in unauthorized practice of law.

With the exception of the Sixth Circuit, every Circuit that has considered the issue of parental rights in the context of IDEA cases in federal courts has found that parents have at least procedural rights of their own under the IDEA. The federal appellate courts have manifested their current confusion on the issue through their collective failure to define meaningfully the difference between procedural and substantive rights, to apply that difference consistently or to find any principled basis for making such a distinction under the IDEA or based on Congressional intent. *See Mosely v. Bd. of Educ. of the City of Chicago*, 434 F.3d 527 (7th Cir. 2006), *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002); *Collinsgru*, 161 F.3d at 227; *Devine*, 121 F.3d at 582; *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125-26 (2d Cir. 1998). The issue is so

convoluted that some courts, in order to avoid an unfair result, disregard the substantive/procedural distinction in practice, while purporting to maintain the distinction in theory. *See, e.g.*, *Mosely*, 434 F.3d at 532; *Murphy*, 297 F.3d at 200.

In reality, procedural and substantive rights cannot be separated. *See Maroni*, 346 F.3d at 255. Such a legal separation is untenable, and, if not corrected, will continue to confuse parents and courts about the scope of rights a parent may seek to vindicate in federal court, a likely motivation for this Court to have accepted certiorari in this case. One outcome of maintaining this artificial distinction is to cause continued prosecution of parents for seeking court redress. At least one bar association chose to exercise its authority over the practice of law to punish parents who attempt to bring an IDEA action *pro se* before a federal court. *See* Petr.s' Supplemental Br. Cert. at 2-3. Prior to this Court accepting certiorari, the Cleveland Bar Association investigated the Winkelmans and stated its intent to file a claim for unauthorized practice of law for filing the notice of appeal before the Sixth Circuit in this case. App. B to Petr.s' Supplemental Br. Cert. at 5A. The same bar association charged another family with unauthorized practice of law for representing their interests as parents under the IDEA in federal complaints. App. A, B, C to Petr.s' Supplemental Br. Cert.

The reality for parents facing a possible misdemeanor charge for pursuing their rights in federal court is that they may choose to abandon their claim if they cannot afford an attorney. This chilling effect was not intended by the IDEA and is further evidence that Congress did not create a substantive/procedural rights distinction.

D. Limiting or preventing parents from proceeding *pro se* will effectively deny access to federal courts in IDEA cases and allow administrative decisions to be final, rather than rendering courts the consistent and final arbiters of IDEA claims.

The procedural rights accorded to aggrieved parties under the IDEA are much greater rights than those granted to aggrieved parties that challenge other types of administrative decisions. Denying IDEA aggrieved parties the right to these critical procedural safeguards directly contravenes Congressional intent and effectively renders an impartial hearing officer (IHO) the final arbiter of an IDEA claim. When courts preclude parents who cannot afford legal counsel from proceeding *pro se* on behalf of their children with disabilities on IDEA claims, the checks and balances statutorily established by Congress to ensure that children have the opportunity to judicially enforce their IDEA rights likely will not exist for poor children and children unable, through their parents, to find a *pro bono* lawyer. Such a result unfairly precludes not only meaningful challenges by parents to flawed IHO rulings, but it also unfairly precludes the parent who has prevailed before the IHO from defending the ruling if the school district files a court action. If parents are not permitted to defend their hard-won administrative decision by proceeding *pro se*, then the school district could simply file a federal action and await a default in their favor.

IDEA's language expresses a clear Congressional intent that courts, rather than IHO's, give the final word in IDEA cases. Indeed, it is a vital "procedural safeguard," as reflected by the title of 20 U.S.C.A. § 1415, which statutorily and unequivocally confers upon an aggrieved party the right to bring a civil action in federal court. *See* 20 U.S.C.A. § 1415(i)(2)(A) (entitled "Procedural safeguards" and providing that "any party aggrieved by the findings and

decision" of the administrative proceedings may file a civil action in the federal district court or in any state court of competent jurisdiction). "In explicitly providing in § 1415(e)(2) that any aggrieved party has a right to bring a civil action . . . Congress clearly contemplated more than the customary appeal from an administrative decision." *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443, 450 (3d Cir. 1981), *cert. denied sub nom*, *Scanlon v. Tokarcik*, 458 U.S. 1121 (1982).

Bringing an action in court under the IDEA is a more significant procedural safeguard than are appeals from other administrative actions. "Decision on the record compiled before the administrative agency is the norm in judicial review of administrative action." *Hunger v. Leininger*, 15 F.3d 664, 670 (7th Cir. 1994). In contrast, a court in an IDEA action is instructed that it is not only to "receive the records of the administrative proceedings," but also "shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C.A. § 1415(i)(2).

The Ninth Circuit has observed that "judicial review in IDEA cases differs substantially from judicial review of other agency actions, in which courts generally are confined to the administrative record and are held to a highly deferential standard of review." *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 757 (3d Cir. 1995) (*quoting Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471 (9th Cir. 1993), *cert. denied*, 513 U.S. 825 (1994)). Because the IDEA specifically requires a district court to review the administrative record and hear additional evidence, and grant appropriate relief based on the preponderance of the evidence, a district court "does not use the substantial evidence standard typically applied in the review of administrative agency decisions, 'but instead must decide independently whether the requirements of the IDEA

are met.'" *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 927 (10th Cir. 1995) (*quoting Bd. of Educ. v. Illinois State Bd.*, 41 F.3d 1162, 1167 (7th Cir. 1994)); *see also Valerie J. v. Derry Coop. Sch. Dist.*, 771 F. Supp. 483, 488, *order clarified*, 771 F. Supp. 492 (D.N.H. 1991) (finding that although the district court sits in most respects as an appellate court, "its duty is to evaluate all evidence independently and not to merely affirm or reverse" the decision of the appeals panel).

This Court noted the Congressional intent underlying the IDEA was for courts, not the administrative officers, to make final decisions:

> . . . Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make "independent [decisions] based on a preponderance of the evidence."

Rowley, 458 U.S. at 205 (*citing* S. Conf. Rep. No. 94-455 at 50 (1975). *See also* 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams)). Inherent in Congress's decision to allow courts to consider additional evidence and make independent decisions is an attempt to ameliorate the concerns that an administrative proceeding may not receive all the information it needs to adjudicate rights under the IDEA and that the rights adjudicated under the IDEA are so important that they deserve more thorough scrutiny by an impartial judicial body.

CONCLUSION

For the reasons set forth above this Court should reverse the decision of the Sixth Circuit.

Respectfully submitted,

LYNN S. PREECE
Counsel of Record
ERIN MCCLOSKEY MAUS
ANGELA C. VIGIL
SHOSHANA ISAAC
MARIANNA LVOVSKY
LIQUITA L. THOMPSON
AMBER HOFFMAN
KELLY GOING
BAKER & MCKENZIE LLP
130 E. Randolph Drive
Suite 3500
Chicago, IL 60601
(312) 861-8022

Counsel for Amici Curiae

968 F (13) Dec 15 2006

No. 05-983

In The Supreme Court of the United States

JACOB WINKELMAN, ET AL.,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE EQUAL JUSTICE FOUNDATION, THE OHIO LEGAL ASSISTANCE FOUNDATION, AND THE OHIO LEGAL RIGHTS SERVICE AS *AMICI CURIAE* SUPPORTING THE PETITIONERS

KATHLEEN M. TRAFFORD
PAUL G. ROZELLE
ROBERT J. KRUMMEN
JOSHUA A. KIMSEY
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215-6194

ROBERT M. CLYDE
LISA L. ESCHLEMAN
OHIO LEGAL ASSISTANCE FOUND.
10 West Broad Street, Suite 950
Columbus, Ohio 43215-3483

BENSON A. WOLMAN
Counsel of Record
DIANNA J. PARKER
EQUAL JUSTICE FOUNDATION
88 East Broad Street, Suite 1590
Columbus, Ohio 43215-3506
(614) 221-9800

MICHAEL KIRKMAN
OHIO LEGAL RIGHTS SERVICE
50 West Broad Street, Suite 1400
Columbus, Ohio 43215-5923

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

A. This Court Has Long Recognized the Fundamental Due Process Right of Parents to Direct the Education and Upbringing of Their Children 4

B. Requiring Parents of a Child with a Disability to Obtain Counsel to Enforce Their Own and Their Child's IDEA Claims in Court Deprives Them of Their Right to Equal Access to the Courts 7

1. The private interest affected is a fundamental liberty interest 8

2. The risk of erroneous deprivation is great and permitting parents to represent their children under the IDEA reduces this risk 9

3. The State's interests are insufficient to overcome the fundamental private right implicated 10

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Bates v. State Bar of Ariz., 433 U.S. 350 (1977) 11, 12

Buckley v. Valeo, 424 U.S. 1 (1976) 10

Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005) 7, 9

Cleveland Bar Ass'n v. CompManagement, Inc., 818 N.E.2d 1181 (Ohio 2004) 11

Farrington v. Tokushige, 273 U.S. 284 (1927) 5

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 8

Harris v. Apfel, 209 F.3d 413 (5th Cir. 2000) 13

Honig v. Doe, 484 U.S. 305 (1988) 14

In re Primus, 436 U.S. 412 (1978) 11

Leis v. Flynt, 439 U.S. 438 (1979) 11

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 8, 10

Machadio v. Apfel, 276 F.3d 103 (2d Cir. 2002) 13

Mathews v. Eldridge, 424 U.S. 319 (1976) 3, 8, 9

Meyer v. Nebraska, 262 U.S. 390 (1923) 5

Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982) 11

NAACP v. Button, 371 U.S. 415 (1963) 11

Ortwein v. Schwab, 410 U.S. 656 (1973) 10

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 5

Prince v. Massachusetts, 321 U.S. 158 (1944) 5

Reno v. Flores, 507 U.S. 292 (1993) 4

Santosky v. Kramer, 455 U.S. 745 (1982) 5

TABLE OF AUTHORITIES – Continued

Page

Sperry v. Florida, 373 U.S. 379 (1963) 13

State v. Whisner, 351 N.E.2d 750 (Ohio 1976) 6

Troxel v. Granville, 530 U.S. 57 (2000) 4

Washington v. Glucksberg, 521 U.S. 702 (1997) 4, 6

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 13

Wisconsin v. Yoder, 406 U.S. 205 (1972) 5, 6

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 4

U.S. Const. amend. XIV, § 1 4

STATUTES

20 U.S.C. § 1400 *et seq.* 2

20 U.S.C. § 1415(a) 3

20 U.S.C. § 1415(f) 12

20 U.S.C. § 1415(h) 12

20 U.S.C. § 1415(i)(2)(b) 12

20 U.S.C. § 1415(i)(3) 14

28 U.S.C. § 1654 3

42 U.S.C. § 10541 *et seq.* 1

Ohio Revised Code § 5123.60 1

RULE

S. Ct. R. 37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Louis Brandeis, *Other People's Money* (National Home Library Foundation ed. 1933) 10

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, the Equal Justice Foundation ("EJF") is an Ohio-based nonprofit organization that represents the poor and disadvantaged who may otherwise not have access to the legal system. It undertakes class-action and other impact litigation on behalf of individuals with disabilities, minorities, immigrants, children, the aging, victims of predatory lending and consumer fraud, tenants denied their rights, and institutionalized persons.

Amicus curiae, the Ohio Legal Assistance Foundation ("OLAF"), is a nonprofit entity committed to ensuring equal access to justice by providing legal representation, resources, programs, and services throughout the State of Ohio to serve the unmet civil legal needs of the State's poor. Integral to that mission, OLAF seeks to ensure that individuals and families have access to all of Ohio's courts, whether through paid or *pro bono* counsel.

Amicus curiae, the Ohio Legal Rights Service ("OLRS") is an independent state agency chartered at Ohio Revised Code § 5123.60 to protect and advocate for the rights of people with disabilities. OLRS has been designated by the Governor of Ohio as the protection and advocacy system ("P&A") under federal law for people with disabilities in Ohio. *See* 42 U.S.C. § 10541 *et seq.* Under both state and federal law, OLRS investigates abuse, neglect, and rights violations affecting people with disabilities, and pursues administrative, legal, and policy

---

[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel to a party authored this brief in whole or in part and that no person other than the *amici curiae* and their members made a financial contribution toward the preparation and submission of this brief. Letters reflecting the consent of the parties have been lodged with the Court.

remedies to those violations. As the P&A for Ohio, OLRS has extensive experience representing children with disabilities in special education cases before administrative bodies and in federal court. The National Disability Rights Network (a membership organization of P&As from around the nation) and the Kentucky, Tennessee, and Michigan P&As (as P&As from the Sixth Circuit) have also filed an amicus brief in this case. OLRS recognizes that this case has implications for every Ohio child with a disability and their parents, and therefore joins in this brief with other Ohio-based civil justice groups while supporting the position taken by the other P&A *amici*.

Amici share a common interest in this case: If resources are not sufficient to provide representation, then it is imperative that those unable to afford or to obtain counsel can access the courts and prosecute their claims *pro se*. *Amici* share a further concern over the limited legal representation available to children with disabilities and their parents under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and in whether the holding of the Sixth Circuit deprives those families of the constitutionally enshrined right to due process.

SUMMARY OF THE ARGUMENT

The IDEA expressly places parents in charge of their children's procedural and substantive rights to a free appropriate public education ("FAPE"). At the heart of the IDEA are its procedural "safeguards" and, most fundamentally, the right of *parents* to contest decisions by school boards that deny their children an effective educational

opportunity. *See* 20 U.S.C. § 1415(a). The IDEA empowers parents to advance those rights both by initiating administrative hearings to determine the most appropriate education and by filing suit to review adverse administrative decisions. Despite this grant of statutory authority, the Sixth Circuit has held that parents may not jointly represent themselves and their child with a disability in a suit in federal court. EJF, OLAF, and OLRS anticipate that petitioner and other *amici* will thoroughly brief this Court on how the Sixth Circuit's holding is contrary not only to the language and purpose of the IDEA, but also to the general right of self-representation. *See* 28 U.S.C. § 1654 (permitting individuals to "plead and conduct their own cases personally").

Beyond undermining the IDEA's guarantee of a FAPE, if parents who cannot afford or obtain an attorney are not permitted to prosecute an IDEA case *pro se* in court, such a rule, were it permitted to stand, would set up an untenable constitutional dilemma. Not only will the rights afforded children with disabilities and their parents under the IDEA be rendered meaningless and unenforceable, but the resulting scheme would violate the long-standing fundamental due process right of parents to control and direct the education and upbringing of their children.

Balancing the factors established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in the present case requires that parents of a child with a disability be permitted to pursue their own and their children's rights under the IDEA in federal court without requiring that they obtain counsel. At stake is a fundamental private right; the risk of erroneous deprivation of that right is great; and any state interest is either congruent with the interest of the parents and their children (ensuring the child's education and that he or she becomes a productive citizen) or minimal at best

(ensuring the competent practice of law by a parent of a child with a disability who was already permitted to "practice law" at an earlier due process hearing). Prohibiting parents from asserting IDEA claims *pro se* unconstitutionally denies them, and their children, the right to a FAPE solely because those parents are unable to afford or otherwise obtain legal counsel.

ARGUMENT

A. This Court Has Long Recognized the Fundamental Due Process Right of Parents to Direct the Education and Upbringing of Their Children.

The Fifth Amendment to the United States Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Our judicial system has long recognized that the Due Process Clause guarantees more than fair process. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Due Process Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Glucksberg*, 521 U.S. at 720); *see also Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (referring to the Court's "line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty

interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (citations omitted).

The liberty interest at issue in this case – the interests of parents in the care, custody, control, and education of their children – is perhaps the oldest of the fundamental liberty interests recognized by our Constitution. Parental choices involving the rearing of their children and its relation to family life are among the most basic of constitutionally protected liberty interests. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *Accord Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

More than 80 years ago in *Meyer*, this Court held that the "liberty" protected by the Due Process Clause includes the fundamental right of parents to "establish a home and bring up children" and "to control the education of their own." *Meyer*, 262 U.S. at 399-401. Two years later in *Pierce*, the Court expanded that interest to include the right "to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35. As explained in *Pierce*, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court confirmed the constitutional aspect of a parent's right to direct and control the upbringing of children: "It is cardinal with us that the custody, care and nurture of the child *reside first in the parents*, whose primary function and

freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166 (emphasis added).

Subsequent cases have expanded and explained the fundamental right of parents to determine the care, custody, and control of their children. In *Wisconsin v. Yoder*, this Court recognized the right of parents to manage their children's education. 406 U.S. at 231-33. The Court held that the rights of Amish parents to guide the religious training of their children trumped the State's admittedly significant interest in having children attend school until the age of sixteen. *Id.* As the Court explained, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232. In *Glucksberg*, the Court recognized that "in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children." *Glucksberg*, 521 U.S. at 720 (citing *Meyer* and *Pierce*). In effect, this Court has long and consistently recognized that parents themselves are the real parties in interest, who possess a constitutionally protected due process right, in matters concerning the appropriate education, placement, and treatment of their children. *See State v. Whisner*, 351 N.E.2d 750, 769 (Ohio 1976) ("[T]he right of a parent to guide the education . . . of his or her children is indeed a 'fundamental right' guaranteed by the due process clause of the Fourteenth Amendment.").

Thus, under this Court's long-established due process jurisprudence, when parents sue on behalf of their children under the IDEA, it is their own fundamental, constitutional rights that they are invoking – or, at the very least, those rights are held jointly by parents and their child. Under this Court's extensive precedents, the Due Process Clause protects the fundamental right of parents to evaluate, make decisions, and stridently defend the care, custody, control, and education of their children. Because Parma's objections to *pro se* representation in this case not only threaten to undermine the objectives of the IDEA, but also deprive the parents of children with disabilities of constitutionally protected due process rights, this Court should reject those arguments and reverse the judgment below.

B. Requiring Parents of a Child with a Disability to Obtain Counsel to Enforce Their Own and Their Child's IDEA Claims in Court Deprives Them of Their Right to Equal Access to the Courts.

The Sixth Circuit's decision in *Winkelman*, and in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), on which the *Winkelman* Court relied, prohibits non-attorney parents of children with disabilities from pursuing *pro se* appeals of administrative decisions under the IDEA in federal court. The Winkelmans, and all non-attorney parents of children with disabilities, are thereby summarily deprived of the constitutional right to defend and protect their fundamental interest in the upbringing and education of their children. The proper test for "determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law' is the test that [this Court]

articulated in *Mathews v. Eldridge*." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (citation omitted). *Mathews* requires a careful balancing of three factors.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Balancing these factors in the present case requires that parents of children with disabilities be permitted to pursue their own and their children's rights under the IDEA in federal court without meeting the requirement that they obtain counsel.

1. The private interest affected is a fundamental liberty interest.

The private interest implicated in the present case is of the highest constitutional order. Parents have a fundamental right to determine the care, custody, and control of their children – including the right to make decisions about their child's education. *See* Section A, *supra*. Parental rights in the upbringing of children "are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citation omitted). This factor weighs heavily toward permitting parents to pursue relief *pro se* in federal court and can only be overcome by a compelling

fundamental government interest, which does not exist in this case.

2. The risk of erroneous deprivation is great and permitting parents to represent their children under the IDEA reduces this risk.

The second factor under the *Mathews* test examines the risk of erroneous deprivation and the value of additional procedural safeguards. Under the Sixth Circuit's holding, parents of a child with a disability are completely deprived of the opportunity to defend their own and their child's fundamental due process rights. The Sixth Circuit's jurisprudence in *Winkelman* and in *Cavanaugh* slams the courtroom door and prevents the parents from pursuing any form of relief in federal court unless they fortuitously have the funds to obtain counsel or can obtain *pro bono* representation. *See Cavanaugh*, 409 F.3d at 757 ("Therefore, *any* right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to receive a FAPE, and wholly dependent upon the Cavanaughs' proceeding, *through counsel*, with their appearance on Kyle's behalf.") (emphasis added).

By refusing to recognize the parents' fundamental right to control their children's education, the Sixth Circuit guarantees deprivation of this right in every IDEA case. This error can be corrected simply by re-opening the courtroom door and granting parents the right to proceed *pro se* and on behalf of their child with a disability when appealing an administrative decision under the IDEA. These additional procedural safeguards impose no additional costs on the State and merely require that the parents of a child with a disability be given the same procedural safeguards as every other party alleging a

deprivation of constitutional rights. The courts need not appoint counsel, nor lower the procedural threshold for pursuing a civil action, but only permit parents to appear and plead the appeal.

3. The State's interests are insufficient to overcome the fundamental private right implicated.

None of the possible State interests implicated in permitting parents to pursue IDEA appeals *pro se* are sufficient to justify infringing a fundamental liberty interest. Admittedly, the State has an interest in ensuring that children with disabilities receive a FAPE and become productive members of society. In this regard, however, the interests of the State and the parents are identical. Justice Brandeis once noted the value of oversight and disclosure for corporations, declaring that "[s]unlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Louis Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933)). Similarly, shining the light of federal court review on school district decisions can serve only to further the goal of ensuring a FAPE for children with disabilities.

The State may also claim a financial interest in limiting parents' access to pursue *pro se* actions in federal court for review of IDEA appeals. This Court has acknowledged a State's legitimate interest in offsetting the costs of its court system. *M.L.B.*, 519 U.S. at 116 (citing *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973)). Despite this legitimate state interest, the *M.L.B.* Court held that cost could not justify prohibiting *in forma pauperis* appeals in parental status termination cases. *Id.* at 124. Unlike *M.L.B.*, where the State was forced to fund the cost of record preparation

fees for the indigent appellant, the Winkelmans simply wish to pursue their claims by appearing *pro se*, at no cost to the state or federal government or to any other party. Nor is this a question of requiring court-appointed counsel. Thus, the State's financial interest, while a legitimate one, is insufficient to limit parents' ability to protect their fundamental rights.

Another state interest that will be claimed is the interest in regulating the practice of law. *See, e.g.*, *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982); *Leis v. Flynt*, 439 U.S. 438, 442 (1979). This state interest is not, however, absolute. The Ohio Supreme Court acknowledges that in certain circumstances the interest in requiring an attorney "is outweighed by other important considerations." *Cleveland Bar Ass'n v. CompManagement, Inc.*, 818 N.E.2d 1181, 1189 (Ohio 2004). The Court, which exercises plenary power to regulate the practice of law in Ohio, recognizes that "in certain limited settings the public interest is better served by authorizing laypersons to engage in conduct that might be viewed as the practice of law." *Id.* (upholding administrative rules and tradition authorizing third parties to represent employers and employees during worker compensation hearings). The public interest surely requires the State to relax the traditional prohibition against unauthorized practice in this narrow legal context, where its enforcement deprives a parent and child of individual fundamental rights. *See, e.g.*, *In re Primus*, 436 U.S. 412, 439 (1978) (free association); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (free speech); *NAACP v. Button*, 371 U.S. 415, 438-40 (1963) (free association).

The primary concern that legitimizes the State's interest in regulating the unauthorized practice of law is

protecting the public from poor representation in court. *See, e.g.*, *Bates*, 433 U.S. at 361. Such concern for the public welfare is not implicated by parents acting *pro se* to defend their own fundamental rights in federal court. The Winkelmans are not offering representation to members of the general public; they are merely seeking to represent themselves. The State may attempt to argue it is protecting the interest of a child with a disability in receiving competent legal counsel. Such a claim is not credible because the State's position ensures that the child never has a day in court, much less effective legal representation.

The State's interest in regulating the practice of law is further minimized in this case by the fact that parents are permitted to represent their child with a disability at the administrative due process hearing. Under the IDEA, parents have an absolute statutory right to pursue issues in a due process hearing and to make those decisions without legal counsel. 20 U.S.C. § 1415(f), (h). If parents are going to shortchange their child inadvertently by pursuing IDEA claims without an attorney, they will do so at the due process hearing when they make critical decisions about what evidence to present and how to cross-examine the school district's witnesses. Lodging a claim in court following exhaustion of the parents' administrative remedies does not engender *de novo* review; the district court considers the administrative record and may, in its discretion, take additional evidence. 20 U.S.C. § 1415(i)(2)(b). An attorney who appears for the first time at the district court may not be able to cure mistakes made by the parents of a child with a disability at the due process hearing. Given that parents may provide representation to their child with a disability at the due process hearing, the

State's interest in "protecting" the public from a parent's representation of his or her child with a disability at a subsequent court proceeding is minimal, if one exists at all.

In fact, permitting parent appearances and *pro se* representation of their child with a disability is akin to permitting parents to pursue claims for social security income ("SSI") benefits for their children in federal court. *See Machadio v. Apfel*, 276 F.3d 103, 107 (2d Cir. 2002); *Harris v. Apfel*, 209 F.3d 413, 416 (5th Cir. 2000). There is no rational basis for the State to permit parental representation in SSI cases in the district court and to deny the same right in IDEA cases. Concluding that parents may appear in IDEA cases for their child does not challenge the State's interest in regulating the practice of law. *See Sperry v. Florida*, 373 U.S. 379, 383 (1963). Rather, it recognizes a well-established constitutional principle that state law is preempted when it effectively imposes an obstacle to rights guaranteed by federal law. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991).

There are less restrictive means by which the district courts can protect the State's interest in protecting the public without infringing parents' fundamental right to control the education of their children. The district courts may, for example, ensure appropriate conduct by requiring parents appearing *pro se* to observe and comply with the ethical rules applying to the legal profession. The district courts also could employ in IDEA cases the same informal procedures they use to secure representation for *pro se* litigants in civil rights cases. District courts have decades of experience in seeking private attorneys to represent *pro se* parties in civil rights cases. Private attorneys may accept these cases at the request of the court and provide

representation on either a *pro bono* basis or in reliance on a prevailing party fee-shifting statute. *See, e.g.*, 20 U.S.C. § 1415(i)(3) (permitting the prevailing party to obtain attorneys' fees). Of course, the district court would exercise its discretion in choosing to appoint counsel in any particular IDEA case, or it could be unsuccessful in securing private counsel. But even if counsel is not secured, due process requires that *pro se* parents must be permitted to proceed. Neither the parent and child, nor the State, will be worse off if the parent and child proceed *pro se* than if the district court dismisses their claims for lack of the ability to secure counsel.

Because the IDEA was intended to ensure the full participation of parents in all educational decisions involving their children, *see Honig v. Doe*, 484 U.S. 305, 311, 324 (1988), and the Sixth Circuit's holding unquestionably subverts a parent's right to challenge such a decision in court, it cannot stand. Prohibiting parents from asserting IDEA claims *pro se* will result in the denial to many students with disabilities of the right to receive a FAPE solely because their parents are unable to afford or otherwise obtain legal counsel. By denying parents the right to represent their children in federal court, the courts are in fact depriving children with disabilities of their day in court. Unless the decision below is set aside, IDEA's purpose – giving parents the ability to participate fully in charting their children's educational destiny – will be thwarted, and the rights of virtually every parent of a child with a disability will be rendered unenforceable.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Sixth Circuit and permit the Winkelmans to present *pro se* the IDEA claims concerning their child's education.

Respectfully submitted,

BENSON A. WOLMAN
Counsel of Record
DIANNA J. PARKER
EQUAL JUSTICE FOUNDATION
88 East Broad Street, Suite 1590
Columbus, Ohio 43215-3506
(614) 221-9800

KATHLEEN M. TRAFFORD
PAUL G. ROZELLE
ROBERT J. KRUMMEN
JOSHUA A. KIMSEY
PORTER WRIGHT
MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215-6194

ROBERT M. CLYDE
LISA L. ESCHLEMAN
OHIO LEGAL ASSISTANCE FOUND.
10 West Broad Street, Suite 950
Columbus, Ohio 43215-3483

MICHAEL KIRKMAN
OHIO LEGAL RIGHTS SERVICE
50 West Broad Street, Suite 1400
Columbus, Ohio 43215-5923

967E

Supreme Court, U.S.
FILED
DEC 15 2006
OFFICE OF THE CLERK

No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, JEFF AND SANDEE WINKELMAN, *et al.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR SENATOR EDWARD M. KENNEDY, SENATOR TOM HARKIN, SENATOR CHRISTOPHER J. DODD, SENATOR RUSSELL D. FEINGOLD, REPRESENTATIVE GEORGE MILLER, REPRESENTATIVE EDWARD J. MARKEY, REPRESENTATIVE MAJOR R. OWENS, REPRESENTATIVE LYNN C. WOOLSEY, REPRESENTATIVE DANNY K. DAVIS, REPRESENTATIVE RUSH HOLT, AND REPRESENTATIVE DENNIS KUCINICH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JODY MANIER KRIS
Counsel of Record
LILLIAN HOWARD POTTER
HOLLY S. HOWELL
THERESE LEE
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

QUESTION PRESENTED

Whether, and if so, under what circumstances, non-lawyer parents of a child with disabilities may prosecute an Individuals with Disabilities in Education Act, 20 U.S.C. §§ 1400 *et seq.*, case *pro se* in federal court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

LEGISLATIVE BACKGROUND 5

ARGUMENT 8

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE IDEA MANIFEST CONGRESSIONAL INTENT TO INCLUDE PARENTS AMONG "AGGRIEVED PARTIES" WHO MAY CHALLENGE VIOLATIONS OF THE IDEA 9

A. Parents Are Parties To Administrative Proceedings And May Appeal The Results Of Local Proceedings As "Aggrieved Parties" Under Subsection 1415(g) 9

B. Parents Are Also "Aggrieved Parties" Under Subsection 1415(i)(2)(A) With The Right To Appeal Administrative Decisions To Federal Court 11

1. Subsection 1415(i)(2)(A) permits the same persons to challenge the same violations as may be challenged under Subsection 1415(g) 11

2. The IDEA requires parents to file administrative claims and to exhaust all such remedies before appealing to federal court, which indicates that parents are intended to be parties to federal judicial review of those claims 14

TABLE OF CONTENTS—Continued

Page

3. The IDEA envisions federal courts having jurisdiction over parents as parties 15

II. PARENTS ARE "AGGRIEVED PARTIES" WITH A RIGHT OF ACTION WHETHER THEIR CLAIMS ASSERT "PROCEDURAL" OR "SUBSTANTIVE" VIOLATIONS OF THE IDEA 16

A. The IDEA Gives Parents The Right To Challenge In Federal Court Any Matter Relating To The Provision Of A FAPE For Their Child 17

B. Congress Conferred On Parents A Right To A FAPE For Their Child That Is Independent Of The Child's Interest In A FAPE 18

1. Congress recognized that parents suffer concrete financial injury when educational agencies fail to comply with the IDEA 20

2. Congress gave parents the right to shape the course and substance of the IEP—a necessary substantive component of a FAPE 22

3. Congress gave parents an independent right to their child's FAPE, because Congress recognized that parents themselves have a vested interest in their children with disabilities becoming self-sufficient adults 23

TABLE OF CONTENTS—Continued

Page

C. The Structure Of The IDEA Affirms The Right of Parents To Make Fundamental Decisions Regarding Their Child's Education 25

III. NOTHING IN THE LEGISLATIVE HISTORY OF THE 2004 AMENDMENTS TO THE ACT AFFECTS A PARENT'S RIGHT TO PROCEED *PRO SE* ON CLAIMS TO ENFORCE RIGHTS UNDER THE IDEA 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Page(s)

Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U.S. 427 (1932) 12

Board of Education v. *Kelly E. ex rel. Nancy E.*, 207 F.3d 931 (7th Cir. 2000) 11, 12

Cavanaugh v. *Cardinal Local School District*, 409 F.3d 753 (6th Cir. 2005) 8, 13, 19

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 28

Collinsgru v. *Palmyra Board of Education*, 161 F.3d 225 (3d Cir. 1998) 8, 13, 16, 19, 25

Cudjoe v. *Independent School District No. 12*, 297 F.3d 1058 (10th Cir. 2002) 11, 12

Gregory K. v. *Longview School District*, 811 F.2d 1307 (9th Cir. 1987) 13

Honig v. *Doe*, 484 U.S. 305 (1988) 10

Kruelle v. *New Castle County School District*, 642 F.2d 687 (3d Cir. 1981) 13

Lillbask ex rel. Mauclaire v. *Connecticut Department of Education*, 397 F.3d 77 (2d Cir. 2005) 10

Maroni v. *Pemi-Baker Regional School District*, 346 F.3d 247 (1st Cir. 2003) 11, 12, 13, 14, 26

Mills v. *Board of Education*, 348 F. Supp. 866 (D.D.C. 1972) 5

Mosely v. *Board of Education*, 434 F.3d 527 (7th Cir. 2006) 16

Muth v. *Central Bucks School District*, 839 F.2d 113 (3d Cir. 1988), *rev'd on other grounds sub nom Dellmuth* v. *Muth*, 491 U.S. 223 (1989) 13

Pennsylvania Ass'n for Retarded Children v. *Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Rettig v. *Kent City School District*, 788 F.2d 328 (6th Cir. 1986) 13

School Committee of Burlington v. *Department of Education of Massachusetts*, 471 U.S. 359 (1985) 21

Schreiber v. *Ridgewood Board of Education*, 952 F. Supp. 205 (D.N.J. 1997) 13

Wenger v. *Canastota Central School District*, 146 F.3d 123 (2d Cir. 1998) 16

STATUTES AND RULES

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

20 U.S.C. § 1400(c)(2)(D) 20
20 U.S.C. § 1400(c)(3) 18
20 U.S.C. § 1400(c)(5)(B) 25
20 U.S.C. § 1400(d)(1)(A) 19, 23
20 U.S.C. § 1400(d)(1)(B) 18, 19
20 U.S.C. § 1400(d)(3) 26
20 U.S.C. § 1401(9) 20
20 U.S.C. § 1401(9)(D) 22
20 U.S.C. § 1401(10)(E) 15
20 U.S.C. § 1401(29) 20
20 U.S.C. § 1412(a)(10)(C) 21
20 U.S.C. § 1412(a)(14)(E) 15
20 U.S.C. § 1414(a) 5
20 U.S.C. § 1414(a)(1)(D) 6
20 U.S.C. § 1414(a)(2) 7
20 U.S.C. § 1414(a)(2)(B) 6
20 U.S.C. § 1414(b) 5
20 U.S.C. § 1414(b)(1) 6
20 U.S.C. § 1414(b)(2)(A) 6
20 U.S.C. § 1414(b)(4) 5
20 U.S.C. § 1414(b)(4)(A) 6
20 U.S.C. § 1414(c)(1)(A) 6
20 U.S.C. § 1414(c)(3) 7

TABLE OF AUTHORITIES—Continued

Page(s)

20 U.S.C. § 1414(d) 5, 22
20 U.S.C. § 1414(d)(1)(A) 6
20 U.S.C. § 1414(d)(1)(B) 6
20 U.S.C. § 1414(d)(1)(C) 6, 22
20 U.S.C. § 1414(d)(3)(A) 7, 22
20 U.S.C. § 1414(d)(3)(D) 7, 23
20 U.S.C. § 1414(d)(4)(A) 6, 7, 22
20 U.S.C. § 1414(f) 22
20 U.S.C. § 1415(b) 7
20 U.S.C. § 1415(b)(2) 19
20 U.S.C. § 1415(b)(6) 7, 9, 17
20 U.S.C. § 1415(b)(6)(B) 10
20 U.S.C. § 1415(b)(8) 10
20 U.S.C. § 1415(c)(2)(B) 10
20 U.S.C. § 1415(d)(2) 10
20 U.S.C. § 1415(e) 7
20 U.S.C. § 1415(e)(2)(A) 10
20 U.S.C. § 1415(e)(2)(F) 15
20 U.S.C. § 1415(f) 12
20 U.S.C. § 1415(f)(1)(A) 7, 10
20 U.S.C. § 1415(f)(1)(B) 15
20 U.S.C. § 1415(f)(3)(E) 17, 18
20 U.S.C. § 1415(g) 7, 11, 12, 13
20 U.S.C. § 1415(i)(2)(A) 7, 11, 12, 13
20 U.S.C. § 1415(i)(3)(B) 16
20 U.S.C. § 1415(*l*) 14
20 U.S.C. § 1450(1) 23
20 U.S.C. § 1450(3) 24
20 U.S.C. § 1470(1) 24
20 U.S.C. § 1471(b)(1)(B) 24
20 U.S.C. § 1472(a)(1)(B) 24
28 U.S.C. § 1654 ..... 4, 9
Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 ..... 9, 11, 17, 19, 23
Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 ..... 5, 15

TABLE OF AUTHORITIES—Continued

Page(s)

Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 5
Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 ..... 5, 7, 20, 21, 25, 26
Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 ..... 2, 5, 7
34 C.F.R. § 300.507 (2006) 10
Fed. R. Civ. P. 17(c) 8, 19

LEGISLATIVE HISTORY

121 Cong. Rec. 37024 (1975) 5
131 Cong. Rec. S1979 (daily ed. Feb. 6, 1985) 20
132 Cong. Rec. H17611 (daily ed. July 24, 1986) 25
150 Cong. Rec. H10013 (daily ed. Nov. 19, 2004) 23, 24
150 Cong. Rec. S11543 (daily ed. Nov. 19, 2004) 5, 23, 24
H.R. Rep. No. 99-296 (1985) 14
H.R. Rep. No. 108-77 (2003) 26
S. Rep. No. 94-168 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425 ..... 20, 22, 25
S. Rep. No. 94-455 (1975) (Conf. Rep.), *reprinted in* 1975 U.S.C.C.A.N. 1480 17
S. Rep. No. 99-112 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798 ..... 7, 14, 15
S. Rep. No. 105-17 (1997) 26
S. Rep. No. 108-185 (2003) 11, 16, 27

OTHER AUTHORITIES

Merrow, *What's So Special About Special Education?*, Educ. Week, May 8, 1996, at 48 5

IN THE

Supreme Court of the United States

No. 05-983

JACOB WINKELMAN *et al.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This *amici curiae* brief is submitted in support of Petitioners Jacob Winkelman, by and through his parents, Jeff and Sandee Winkelman; Jeff Winkelman; and Sandee Winkelman. By letters filed with the Clerk of this Court, Petitioners and Respondent have consented to the filing of this brief.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are four United States Senators and seven members of the United States House of Representatives. Senator Edward M. Kennedy was an original sponsor of the 1975 Education for All Handicapped Children Act (EHA) and is Ranking Member of the Senate Health, Education, Labor, and Pensions (HELP) Committee. Senator Kennedy

[1] As required by Rule 37.6 of this Court, counsel for *amici* submits the following: No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and its counsel made any monetary contribution toward the preparation or submission of this brief.

introduced the bill to reauthorize the Individuals with Disabilities Education Act (IDEA) in 2004 and introduced tl.e 1997 IDEA with Senator Tom Harkin and Senator Christopher J. Dodd.[2] Senator Harkin serves on the HELP Subcommittee on Education and Early Childhood Development and sponsored the IDEA in 2004. Senator Dodd also sponsored the IDEA in 2004 and is Ranking Member of the HELP Subcommittee on Education and Early Childhood Development. Senator Russell D. Feingold strongly supported the IDEA in both 1997 and 2004. As Ranking Member of the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Property Rights, Senator Feingold has a strong interest in access to justice issues.

Congressman George Miller is the Senior Democrat on the House Education and the Workforce Committee, one of the original authors of the 1975 EHA, and a supporter of the 1997 IDEA. Congressman Edward J. Markey has served in the House of Representatives since 1976 and is a strong supporter of the 1997 IDEA. Congressman Major R. Owens is a member of the House Committee on Education and the Workforce and supported the IDEA in 1997. Congresswoman Lynn C. Woolsey is a member of the House Committee on Education and the Workforce and the Senior Democrat on the Subcommittee on Education Reform, a position she held at the time of the 2004 IDEA reauthorization. She also supported the 1997 IDEA. Congressman Danny K. Davis is a member of the House Committee on Education and the Workforce and its Subcommittee on Education Reform and voted for the 1997 IDEA. Congressman Rush Holt is a member of the House Committee on Education and the Workforce. Congressman Dennis Kucinich is also a member of the House Committee on Education and the Workforce, as well as its Subcommittee on Education Reform. He repre-

---

[2] Congress reauthorized and amended the IDEA in 2004. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (to be codified at 20 U.S.C. §§ 1400 *et seq.*). Unless otherwise indicated, citations are to the statute as amended in 2004.

sents Ohio's 10th Congressional District, which includes the Winkelman family among its constituents and the Parma City School District, where this case originated.

Amici have a significant interest in seeing that the IDEA, like any law passed by Congress, is faithfully enforced. The Sixth Circuit Court of Appeals' decision in this case, if allowed to stand, would severely limit the rights of parents to ensure that their children with disabilities receive a free appropriate public education (FAPE) pursuant to the IDEA. This result would contravene the text of the statute, as well as Congress's purposes in enacting the IDEA.

Amici also have a significant interest in avoiding the need to expend legislative resources to amend a statute that is already clear on an issue. This interest would be adversely affected if the rule announced by the Court of Appeals in this case is upheld. A lengthy and expensive legislative effort would be required in order to amend the IDEA to restore parental rights.

SUMMARY OF ARGUMENT

The Court of Appeals erroneously concluded that parents may not appear *pro se* in federal court to challenge a public school's failure to provide a FAPE to their child with disabilities, as mandated by the IDEA. This interpretation of the IDEA contradicts the plain language of the statute and the rich legislative history that accompanies this fundamental special education law.

In 1975, Congress enacted the EHA, a groundbreaking piece of legislation that reshaped the American educational landscape and remains the foundation of special education programs in all fifty states. Since 1975 and through the EHA's reenactment as the IDEA, Congress has jealously preserved a comprehensive set of safeguards that empowers parents to participate in the development and implementation of special education services for qualified children and to challenge a public school's non-compliance with the IDEA.

The IDEA recognizes parents as parties to all stages of administrative and judicial proceedings when disputes arise

between parents and schools. Thus, parents can be "parties aggrieved" by an adverse, local-level due process hearing under Subsection 1415(g) of the IDEA and consequently have the right to state-level administrative review. The statutory text and legislative history indicate that parents can likewise be "parties aggrieved" by adverse findings arising out of a state-level due process hearing under Subsection 1415(i)(2)(A). Thus, parents have the right to appeal that adverse decision by bringing a cause of action in federal court.

When a local school system violates the IDEA, the Act gives parents the right to initiate a civil suit regarding any matter relating to the provision of a FAPE for their child. In providing this cause of action, Congress expressly recognized the interest of parents in shaping the course and substance of their child's education, in receiving the same financial benefit of a public education as other parents, and in obtaining services guaranteed by the statute that enhance the opportunity of the child to mature into a self-sufficient adult. Thus, parents may independently assert their own right to the guarantee of a FAPE by suing in federal court. Pursuant to 28 U.S.C. § 1654, parents may represent themselves in such actions without the assistance of a lawyer.

Denying or circumscribing the types of claims that parents may bring under the statute has had the effect of denying parents the ability to mount a challenge to the denial of a FAPE when they lack the means to secure counsel for their child. When Congress passed and amended the IDEA over time, it clearly intended to provide parents with the authority to participate significantly in the development and provision of educational services for their child. This participation includes the right to challenge a local school system's failure to meet the standards set forth in the IDEA. Congress provided these rights to parents with the specific goals of easing the financial burden on families of children with disabilities and ensuring that those children receive the same free and appropriate public education as their peers without disabilities.

LEGISLATIVE BACKGROUND

In 1975, Congress enacted the EHA to guarantee families a FAPE for their children with disabilities. Prior to enactment of the EHA, children with disabilities had little or no right to public education. At the time the EHA was passed, Congress noted that "[t]here are over 8 million handicapped children in the United States; yet only 3.9 million are currently receiving an appropriate education; 1.75 million handicapped youngsters are receiving no aid at all; and 2.5 million children are receiving inadequate education." 121 Cong. Rec. 37024 (1975) (statement of Rep. Brademas). The little public education that was provided to students with disabilities was often pitiful. One noted education journalist recalled seeing, during a visit to a public school for handicapped children in 1975, "rows and rows of children and adults strapped to their chairs in a dimly lit room, a cacophony of moans and screams. Four or five attendants stood watch over what seemed to be about a hundred 'students.'" Merrow, *What's So Special About Special Education?*, Educ. Week, May 8, 1996, at 48. Two landmark rulings in 1972 established the constitutional equal protection rights of children with disabilities and led to the EHA's enactment.[3] In 1986, the EHA was amended, Pub. L. No. 99-372, 100 Stat. 796 (1986), and in 1990, was renamed the IDEA, Pub. L. No. 101-476, 104 Stat. 1103 (1990). The IDEA underwent comprehensive revision in 1997 and additional revisions in 2004. Pub. L. No. 105-17, 111 Stat. 37 (1997); Pub. L. No. 108-446, 118 Stat. 2647 (2004).

In the thirty years since passage of the EHA, this series of legislation has transformed American education. "When Congress first passed IDEA, disabled children were shuttered away. They had no place in our society. . . . [N]ow, 6.5 million children with disabilities attend public schools." 150 Cong. Rec. S11543 (daily ed. Nov. 19, 2004) (statement of

---

[3] *See Pennsylvania Ass'n for Retarded Children* v. *Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills* v. *Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

Sen. Kennedy). The IDEA provides the basis for all public education of children with disabilities in the United States today.

The IDEA sets forth a detailed process designed to ensure the right to a FAPE, beginning with the local educational agency's (LEA) identification and initial evaluation of a child who may be disabled. 20 U.S.C. § 1414(a)-(b). Once a child is assessed as disabled and determined to be eligible for special education services, the LEA convenes a meeting to develop an individualized education program (IEP) for the child. *Id.* § 1414(b)(4), (d). The IEP, among other things, delineates the child's current educational level, describes how the child's disability affects the child's ability to learn, sets annual goals for the child, explains how progress toward those goals will be measured, and lists "the special education and related services and supplementary aids and services . . . to be provided to the child." *Id.* § 1414(d)(1)(A)(i)(IV). Services must be provided to the child in accordance with an annually reviewed IEP, and the child is reevaluated at least every three years. *Id.* § 1414(a)(2)(B)(ii), (d)(4)(A)(i).

Parents have full participatory rights to shape the content of the IEP at every step of this process. A LEA must obtain informed consent from parents before evaluating the child and must notify parents of what procedures it proposes to use. 20 U.S.C. § 1414(a)(1)(D)(i)(I), (b)(1). "[I]nformation provided by the parent" must be examined as part of this evaluation. *Id.* § 1414(b)(2)(A), (c)(1)(A)(i). The determination of whether the child has a disability and his or her educational needs "shall be made by a team of qualified professionals and the parent of the child," known collectively as the "IEP team." *Id.* § 1414(b)(4)(A). Parents are full members of the IEP team and as such, for example, may recommend "other individuals who have knowledge or special expertise regarding the child" to be part of the team that develops the IEP and reviews the child's functional and academic performance. *Id.* § 1414(d)(1)(B). Parents also have the right to the attendance of every IEP team member at any IEP meeting. *Id.* § 1414(d)(1)(C)(i). In developing and reviewing the

child's IEP, the team must consider "the concerns of the parents for enhancing the education of their child." *Id.* § 1414(d)(3)(A)(ii); *see also id.* § 1414(d)(4)(A)(ii)(III). After the IEP is created, the LEA has no unilateral right to modify that IEP without first holding a team meeting. *Id.* § 1414(d)(3)(D). Parents have a right to an annual reevaluation of their disabled child, and LEAs must obtain parental consent before each such reevaluation. *Id.* § 1414(a)(2), (c)(3). In addition, parents have the right to "examine all records" relating to their child and to written prior notice in the parents' native language of certain actions by the LEA. *Id.* § 1415(b).

Parents who are dissatisfied with their child's IEP may file a due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). Voluntary mediation is available both before and after a complaint is filed. *Id.* § 1415(e). Both the parents and the LEA have the right to request an impartial due process hearing on the matters in the complaint. *Id.* § 1415(f)(1)(A). If the due process hearing is conducted by the LEA, "any party aggrieved" by the findings and decision may seek review from the state educational agency. *Id.* § 1415(g). Finally, Subsection 1415(i)(2)(A) provides that "any party aggrieved by the findings and decision" of the due process hearing or a state-level review has the right to bring a civil action in federal court.

The framework for these guarantees in the IDEA descends directly from the comprehensive set of safeguards that the EHA established in 1975. "Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to all parents." S. Rep. No. 99-112, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799. This framework remains largely intact despite major revisions by the IDEA amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37, and the IDEA reauthorization of 2004, Pub. L. No. 108-446, 118 Stat. 2647.

ARGUMENT

This case arose out of confusion among the courts of appeals as to whether parents may appear in federal court, without the assistance of counsel, as the legal representative of their minor child, who alleges violations of the IDEA as a named party. This confusion resulted from the misguided holdings of two courts of appeals that the IDEA provides only children with disabilities, and not their parents, with a cause of action to challenge in federal court the failure of a public school to provide a FAPE. *See Cavanaugh* v. *Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005); *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998). In the wake of this clearly erroneous but binding precedent, parents had no ability to enforce the right to the FAPE that is at the heart of the IDEA, except by naming their child as a minor party and prosecuting the federal lawsuit as the child's next friend under Federal Rule of Civil Procedure 17(c). A problem arose, however, where non-lawyer parents could not afford, or did not prefer, to enlist the services of a lawyer to handle the matter and attempted to appear on a *pro se* basis to advocate for the rights of their child. LEAs argued that the IDEA did not expressly confer any right onto parents to present, *pro se*, a cause of action belonging to the child named in the complaint.

The debate concerning whether parents may serve in a *pro se* capacity to enforce IDEA rights asserted by a child with disabilities is largely irrelevant once one properly determines that a parent has a freestanding right to bring a cause of action in federal court for the LEA's failure to provide a FAPE for his or her child. As explained below, Congress expressly conferred a cause of action upon parents of children with disabilities to proceed individually as aggrieved parties in federal court if a LEA fails to provide a FAPE to their child. This cause of action available to parents is plainly expressed in the text of the IDEA and is strongly reinforced by the purposes and legislative history of the statute. In providing this cause of action, Congress recognized the interest of parents in guiding the course and

substance of their child's education, in receiving the same financial benefit of a public education as other parents, and in obtaining services guaranteed by the statute that enhance the opportunity of the child to mature into a self-sufficient adult. Parents may independently vindicate the guarantee of a FAPE by suing in federal court. Pursuant to 28 U.S.C. § 1654, parents may represent themselves in such actions without the assistance of a lawyer.

I. THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE IDEA MANIFEST CONGRESSIONAL INTENT TO INCLUDE PARENTS AMONG "AGGRIEVED PARTIES" WHO MAY CHALLENGE VIOLATIONS OF THE IDEA

The IDEA provides two procedural levels in which parents may challenge violations of the IDEA, including the failure of a LEA to provide a FAPE for their child. The first level involves administrative proceedings challenging the denial of a FAPE before either a local or a state educational agency. The second level permits claims in federal court to challenge the administrative decisions made at the first level. Both avenues expressly contemplate that parents may initiate and prosecute the challenge as parties to the respective proceeding.

A. Parents Are Parties To Administrative Proceedings And May Appeal The Results Of Local Proceedings As "Aggrieved Parties" Under Subsection 1415(g)

In both the EHA and the IDEA, Congress consistently contemplated that parents would be parties at every stage of the administrative proceedings set forth in Section 1415 of the IDEA. Section 1415 requires state and local agencies to provide an administrative complaint process in which any party may "present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." Pub. L. No. 94-142, § 615(b)(1)(E), 89 Stat. 773, 788 (1975) (codified as amended at 20 U.S.C. § 1415(b)(6)).

Congress understood that parents—and not their minor children—would initiate administrative proceedings. Thus, the statute explicitly referred to parents in connection with the complaint filed as part of those proceedings. For example, the statute of limitations provision in Subsection 1415(b)(6)(B) requires a complaint to be filed "not more than 2 years before the date the *parent* or public agency knew or should have known about the alleged action that forms the basis of the complaint." (Emphasis added.) Subsection 1415(b)(8) requires state educational agencies to develop a model form "to assist *parents* in filing a complaint"; Subsection 1415(c)(2)(B) requires LEAs to respond to a "*parent's* due process complaint notice" within 10 days of receiving it; and Subsection 1415(d)(2) mandates that educational agencies provide "a full explanation of the procedural safeguards, written in the native language of the *parents*." (Emphases added.) *See also* 34 C.F.R. § 300.507(a)(1) ("A parent or a public agency may file a due process complaint[.]").[4]

After the complaint is filed, "the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing." 20 U.S.C. § 1415(f)(1)(A). Section 1415 contains numerous references to parents as parties in due process hearings. For example, Subsection 1415(e)(2)(A)(ii) ensures that "the mediation process . . . is not used to deny or delay *a parent's right* to a due process hearing." (Emphasis added.) The Senate Committee on Health, Education, Labor, and Pensions discussed this parental right in its report on the 2004 revisions of the IDEA:

---

[4] *See also Honig* v. *Doe*, 484 U.S. 305, 311-312 (1988) ("[T]he [EHA] establishes various procedural safeguards [for] parents. . . . These safeguards include . . . an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education."); *Lillbask ex rel. Mauclaire* v. *Connecticut Dep't of Educ.*, 397 F.3d 77, 82 (2d Cir. 2005) ("IDEA requires states to provide a disabled child's parent or guardian with 'an opportunity to present complaints.'").

> The statutory language of IDEA makes clear that a parent has a right to file a due process complaint and to have the opportunity for a due process hearing. It is unquestioned that parents have the right to bring a complaint and participate in a due process hearing without an attorney.

S. Rep. No. 108-185, at 41 (2003).

If a LEA or an intermediate educational unit conducts the due process hearing, the IDEA gives "any party aggrieved by the findings and decision" the right to appeal those findings to the state educational agency. 20 U.S.C. § 1415(g); *see also* Pub. L. No. 94-142, § 615(c), 89 Stat. 789. Because parents are plainly parties to any due process hearing arising out of a due process complaint, courts consistently hold that parents are "parties aggrieved" by an adverse decision in those proceedings, and are entitled under Subsection 1415(g) to a state-level administrative appeal to challenge any findings or decision made in the local-level due process hearing. *See Maroni* v. *Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 251-252 (1st Cir. 2003); *Cudjoe* v. *Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1064 (10th Cir. 2002); *Board of Educ.* v. *Kelly E. ex rel. Nancy E.*, 207 F.3d 931, 935 (7th Cir. 2000).

B. Parents Are Also "Aggrieved Parties" Under Subsection 1415(i)(2)(A) With The Right To Appeal Administrative Decisions To Federal Court

1. Subsection 1415(i)(2)(A) permits the same persons to challenge the same violations as may be challenged under Subsection 1415(g)

Subsection 1415(i)(2)(A) permits federal courts to review the outcome of due process hearings. This subsection of the Act provides that "[a]ny party aggrieved by the findings and decision made [in a due process hearing under Subsection (f)], shall have the right to bring a civil action with respect to the complaint presented pursuant to this section." In several pertinent respects, this language precisely mirrors that of Subsection 1415(g) discussed above. First, both

subsections refer to "any party aggrieved." Second, both subsections define the event from which the party is aggrieved in the same way—the party must be aggrieved by "the findings and decision" made "under [Subsection (f)]." The distinction between these two provisions concerns the structure of the state administrative process: where a state provides that a LEA must conduct the due process hearing contemplated by Subsection 1415(f), aggrieved parties must first appeal to a statewide educational agency before proceeding to federal court. If a state provides a Subsection 1415(f) hearing by a statewide educational agency in the first instance, aggrieved parties may proceed immediately to federal court. But aside from the differing procedures applicable in different states, the grievance and the parties aggrieved are textually identical in Subsections 1415(g) and 1415(i)(2)(A).

It is a normal presumption of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). Therefore it is presumed that, absent plain language to the contrary, if parents are "parties aggrieved" in one subsection of Section 1415—the administrative appeal process in Subsection (g)—then they are also "parties aggrieved" for purposes of another subsection of Section 1415—the federal court review of the due process hearing in Subsection (i)(2)(A). *See Maroni*, 346 F.3d at 252.

The IDEA contains no indication that Congress intended the term "party aggrieved" to have different meanings in Subsections 1415(g) and 1415(i)(2)(A). For years, states and courts have recognized that a parent may be a party aggrieved under Subsection 1415(g) and may appeal any adverse decision with respect to the findings and decision rendered in a local-level due process hearing. *See Maroni*, 346 F.3d at 251-252; *Cudjoe*, 297 F.3d at 1064; *Kelly E. ex rel. Nancy E.*, 207 F.3d at 935. Indeed, the "party aggrieved" language in the IDEA was imported directly from its predecessor statute, the EHA. When the IDEA was

passed and this term was imported from the EHA into the IDEA, courts had "almost uniformly permitted parents to sue"—with or without the assistance of counsel—to enforce the right to a FAPE under the EHA. *Maroni*, 346 F.3d at 250; *see also Kruelle* v. *New Castle County Sch. Dist.*, 642 F.2d 687, 690 & n.4 (3d Cir. 1981) (allowing parents to proceed *pro se*, without discussion, in case challenging provision of FAPE to their son under the EHA; noting without discussion that "20 U.S.C. § 1415(e)(2) provides that any party aggrieved by an agency decision shall have the right to bring a civil action . . . in a district court"); *Gregory K.* v. *Longview Sch. Dist.*, 811 F.2d 1307 (9th Cir. 1987) (allowing parents to proceed *pro se*, without discussion, in case challenging provision of FAPE to their child under the EHA); *Rettig* v. *Kent City Sch. Dist.*, 788 F.2d 328 (6th Cir. 1986) (same); *Schreiber* v. *Ridgewood Bd. of Educ.*, 952 F. Supp. 205 (D.N.J. 1997) (same); *Muth* v. *Central Bucks Sch. Dist.*, 839 F.2d 113 (3d Cir. 1988) (same), *rev'd on other grounds sub nom., Dellmuth* v. *Muth*, 491 U.S. 223 (1989).

Courts that implicitly have concluded that parents cannot be "parties aggrieved" under Subsection 1415(i)(2)(A) to the extent that they challenge the failure to provide a FAPE, *see Cavanaugh*, 409 F.3d at 756; *see also Collinsgru*, 161 F.3d at 234-235, have simply ignored both the parallelism of Subsections 1415(g) and 1415(i)(2)(A) as well as the plain textual right of "part[ies] aggrieved" to challenge in federal court "the findings and decision made . . . with respect to the complaint," 20 U.S.C. § 1415(i)(2)(A). These courts do not and cannot explain their conclusion—that parents may not challenge the failure to provide a FAPE in federal court—in the face of the plain text of Subsection 1415(g), which states that parents may be parties aggrieved who may challenge that same right before a state reviewing body.

2. The IDEA requires parents to file administrative claims and to exhaust all such remedies before appealing to federal court, which indicates that parents are intended to be parties to federal judicial review of those claims

Under the IDEA, an "aggrieved party" must generally exhaust all administrative remedies before initiating a civil suit. *See, e.g.*, 20 U.S.C. § 1415(*l*) ("the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter"); *Maroni*, 346 F.3d at 251 n.5.

Just as Congress understood that parents would be the initiators of administrative proceedings regarding their children's education, so too did Congress understand that it would be parents who would exhaust those remedies. The legislative record reflects this analysis: the Senate Committee on Labor and Human Relations, in reporting on proposed attorneys' fees amendments to the EHA, explained that "under the EHA *parents* must generally exhaust administrative remedies to attempt to resolve certain disagreements before filing a civil court action." S. Rep. No. 99-112, at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1798, 1805 (emphasis added). Furthermore, as the House Committee on Education and Labor explained, "Congress, by establishing a comprehensive scheme of procedural protections under EHA . . . expected that in appropriate situations these procedures would be used before a *parent* or guardian filed a law suit [sic]." H.R. Rep. No. 99-296, at 4 (1985) (emphasis added); *see also id.* at 7 ("Typically, a *parent* is required to exhaust administrative remedies where complaints involve the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." (emphasis added)).

This provision and its legislative history indicate that Congress saw parents as the initiators of, and therefore parties to, federal judicial review of administrative proceedings under the IDEA.

3. The IDEA envisions federal courts having jurisdiction over parents as parties

The IDEA expressly acknowledges that parents can bring individual causes of action. For example, Sections 1401(10)(E) and 1412(a)(14)(E) read in part: "Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter[.]"

Furthermore, the IDEA explicitly permits parents to resolve IDEA disputes by agreement with the local school system and confers federal jurisdiction over those parent-school agreements. Specifically, Subsections 1415(e)(2)(F) and 1415(f)(1)(B)(iii) provide that—in the event that an agreement is reached during either the mediation process or a resolution session—"the parties shall execute a legally binding agreement[,] . . . signed by both the parent and a representative of the agency[,] . . . [that is] enforceable in any State court of competent jurisdiction or in a district court of the United States."

Finally, Congress passed amendments in 1986 and 2004 that expressly recognize parents as possible "prevailing parties" in civil litigation. The Handicapped Children's Protection Act of 1986 amended the EHA to authorize the award of reasonable attorneys' fees to prevailing parties in litigation. The amendment provides that "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees . . . to the parents or guardian of a handicapped child or youth who is the prevailing party." Pub. L. No. 99-372, § 615(e)(4)(B), 100 Stat. 796 (1986). With this provision, Congress sought to allow courts to award "reasonable attorney fees to prevailing parents in an EHA [civil] action or [administrative] proceeding." S. Rep. No. 99-112, at 12, 1986 U.S.C.C.A.N. at 1802. Congress also plainly envisioned parents as initiating parties to civil actions. *See id.* at 14, 1986 U.S.C.C.A.N. at 1804 ("While the committee has no evidence that parents bring EHA suits which are frivolous, unreasonable, or without foundation, in the rare instance where this occurs, this [principle that a

party who brings a frivolous suit may be liable for the prevailing defendant's attorneys' fees] would apply.").

This analysis is reaffirmed by the 2004 amendments, which expressly provide that attorneys' fees may be awarded "to a prevailing party who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B)(I); *see* S. Rep. No. 108-185, at 2 ("In 1986, P.L. 99–372 authorized attorneys' fees for parents who prevail in due process proceedings and judicial actions against school districts.").

There is no indication either in the IDEA or its legislative history that Congress meant to exclude parents from the process of federal judicial review. Rather, as the administrative exhaustion and attorneys' fees provisions demonstrate, quite the opposite is true. Congress contemplated throughout Section 1415 that parents would be the prosecutors of federal court actions.

II. PARENTS ARE "AGGRIEVED PARTIES" WITH A RIGHT OF ACTION WHETHER THEIR CLAIMS ASSERT "PROCEDURAL" OR "SUBSTANTIVE" VIOLATIONS OF THE IDEA

Several courts of appeals have acknowledged, properly, that parents may be parties aggrieved under Subsection 1415(i)(2)(A) but have erroneously differentiated between parents' rights to bring "procedural" claims under the Act, which they have held to be actionable, versus "substantive" claims, which they either have held or implied that parents may not assert. *See, e.g.*, *Mosely* v. *Board of Educ.*, 434 F.3d 527, 532, 535 (7th Cir. 2006); *Collinsgru*, 161 F.3d at 230-236; *Wenger* v. *Canastota Cent. Sch. Dist.*, 146 F.3d 123, 124-126 (2d Cir. 1998). This distinction does not appear in the statute itself and runs counter to the plain language of the statute, which in many places makes clear that parents have an independent, substantive right to a FAPE for their child. The legislative history of the Act confirms this reading and militates against any such formalistic interpretation of the Act.

A. The IDEA Gives Parents The Right To Challenge In Federal Court Any Matter Relating To The Provision Of A FAPE For Their Child

Under the EHA, aggrieved parties possessed "the right to bring a civil action with respect to *the complaint presented pursuant to this section*, which action may be brought in . . . a district court of the United States without regard to the amount in controversy." Pub. L. No. 94-142, § 615(e)(2), 89 Stat. 789 (emphasis added). Under the EHA, *the complaint presented pursuant to this section* could raise "*any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* § 615(b)(1)(E) (emphasis added). As discussed *supra* pp. 9-11, in enacting the EHA, Congress understood and intended that parents would be the parties presenting such complaints. Thus, the claims to be presented in a complaint are the full panoply of claims that Congress intended to recognize as appropriate for administrative challenge, including the claim that the LEA has denied a child the right to a FAPE. *See* S. Rep. No. 94-455, at 48-49 (1975) (Conf. Rep.), *reprinted in* 1975 U.S.C.C.A.N. 1480, 1502 ("[L]anguage is adopted to assure that . . . any parent or guardian may present a complaint concerning *any matter* regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child." (emphasis in original)).

Subsequent enactments and revisions of both the EHA and IDEA have in no way narrowed the broad scope of claims that may be presented in a complaint under this section. 20 U.S.C. § 1415(b)(6). The IDEA, as amended in 2004, provides that the administrative decision on the complaint "*shall* be made on substantive grounds based on a determination of whether the child received a free appropriate public education." *Id.* § 1415(f)(3)(E)(i) (emphasis added). Put another way, the goal of the administrative hearing is to evaluate the core substantive issue in any proceeding under the IDEA—whether the child with disabilities is receiving

an education that appropriately meets his or her educational needs and therefore constitutes a FAPE.[5]

Because (1) the section of the Act authorizing federal court review of administrative decisions in no way delineates or limits the grounds on which that review may be sought, and (2) those administrative decisions are required to be "made on substantive grounds based on a determination of whether the child received a free appropriate public education," parents who seek judicial review of those administrative decisions necessarily seek judicial review of substantive findings. 20 U.S.C. § 1415(f)(3)(E)(i). The distinction between "substantive" and "procedural" claims in civil litigation under the Act is therefore a distinction with no basis in the Act itself.

B. Congress Conferred On Parents A Right To A FAPE For Their Child That Is Independent Of The Child's Interest In A FAPE

Subsection 1400(d)(1)(B) of the Act states that one of the central purposes of Congress in enacting the EHA and IDEA is "to ensure that *the rights of* children with disabilities and *parents of such children* are protected." (Emphasis added.) *See also* 20 U.S.C. § 1400(c)(3) (stating that since enactment of the EHA, this legislation "has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education"). In identifying the need to protect the rights of parents and not just those of their children, Congress specifically indicated that parents have rights under the Act that are separate from and independent of their children's rights. This conclu-

---

[5] Indeed, if the complaint alleges only procedural inadequacies, "a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—(I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii).

sion is borne out by the many rights guaranteed to parents throughout the Act.[6]

The EHA defined a FAPE as "*special education* and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required [under this title]." Pub. L. No. 94-142, § 602(a)(18), 89 Stat. 775 (emphasis added). Likewise, the Act defined "special education"—as used in the definition of FAPE—as "specially designed instruction, *at no cost to parents or guardians*, to meet the unique needs of a handicapped child." *Id.* § 602(a)(16) (emphasis added). The current legislation, as amended, includes the same definitions of

---

[6] That parents have independent rights to a FAPE under the IDEA in no way diminishes the rights of children under the Act, who have their own right to a FAPE. *See* 20 U.S.C. § 1400(d)(1)(A), (d)(1)(B). Several sections of the IDEA explicitly recognize that some children with disabilities may not have parents able or willing to act for them and instead may have legal guardians or foster parents, or be wards of the state. *See, e.g.*, *id.* § 1415(b)(2) (requiring states and LEAs to establish procedures to protect the rights of children whose parents are unknown, cannot be located, or are wards of the State, including "assignment of an individual to act as a surrogate for the parents"). In such cases, Rule 17(c) of the Federal Rules of Civil Procedure, which allows a parent or guardian to "sue or defend on behalf of" a minor, would be a necessary avenue for these children to challenge the denial of a FAPE in federal court. The IDEA also contemplates that parents may choose to plead a federal cause of action by naming the child as the aggrieved party and acting as a next friend, a decision that might be made for any number of reasons. Indeed, this style of pleading became necessary after two courts of appeals held that parents could not maintain a cause of action challenging the provision of a FAPE. *See Cavanaugh* v. *Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005); *see also Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998). However, the availability under the IDEA of a cause of action for a child with disabilities does not preclude the ability of parents to choose to challenge violations of their own rights under the IDEA in federal court on a *pro se* basis.

FAPE and special education. 20 U.S.C. § 1401(9), (29). By defining a FAPE in this way, Congress set forth two principal components of a FAPE directly tied to parents: (1) services provided without charge to the parents; and (2) services provided in conformity with the IEP required under the IDEA.

1. Congress recognized that parents suffer concrete financial injury when educational agencies fail to comply with the IDEA

In mandating the provision of a free education to children with disabilities, Congress sought to equalize the disparity between: (1) families of children without disabilities, who may rely on public education to avoid the costs of a private school education; and (2) families of children with disabilities who, before the enactment of the EHA, "were often forced to find services outside the public school system, often at great distance from their residence and at their own expense." Pub. L. No. 105-17, § 601(c)(2)(E), 111 Stat. 37, 39 (1997) (codified as amended at 20 U.S.C. § 1400(c)(2)(D)).

"Congress knew that there would be instances where parents would be denied the free appropriate public education to which their handicapped child was legally entitled." 131 Cong. Rec. S1979 (daily ed. Feb. 6, 1985) (statement of Sen. Weicker). Therefore, explained the Senate Committee on Labor and Public Welfare in 1975,

> [i]f a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under [this legislation] applies.

S. Rep. No. 94-168, at 32 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1456.

In 1985, this Court held that by authorizing courts to grant appropriate relief in IDEA cases, "Congress meant to include retroactive reimbursement to parents [of private school expenses] as an available remedy in a proper case." *School Comm. of Burlington* v. *Department of Educ. of Mass.*, 471 U.S. 359, 370 (1985). The 1997 amendments to the IDEA codified the right of parents to seek reimbursement of tuition expenses incurred as the result of an unlawful denial of a FAPE. Pub. L. No. 105-17, § 612(a)(10)(C)(ii), 111 Stat. 63. As amended, the IDEA provides:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Id. (codified as amended at 20 U.S.C. § 1412(a)(10)(C)(ii)).

By providing that parents may be reimbursed when their child has been denied a FAPE, Congress explicitly recognized that parents themselves have a financial stake in—and attendant rights to—their child's education. The right of reimbursement runs to the parents and depends upon an evidentiary showing that the public school system has failed in its duty to provide a FAPE. This right is not implied; it is express (at least after the 1997 codification of the remedy allowed in *Burlington*). Furthermore, it is not procedural in nature; it is quintessentially a substantive right of parents to secure the public benefit of a quality education for their children that is funded by the parents' tax dollars.

2. Congress gave parents the right to shape the course and substance of the IEP—a necessary substantive component of a FAPE

"[C]onformity with the [IEP]" is an essential component of the provision of a FAPE. 20 U.S.C. § 1401(9)(D) (defining FAPE to constitute services "provided in conformity with the individualized education program required under section 1414"); *see id.* § 1414(d) (governing the development, review, and revision of the IEP). As discussed *supra* at pp. 6-7, parents have extensive rights in developing and modifying the IEP.

The Senate Labor and Public Welfare Committee, in reporting on the 1975 EHA, explained that "the Committee intends to ensure adequate involvement of the parents or guardian of the handicapped child, and the child (when appropriate) in both the [IEP] statement and its subsequent review and revision." S. Rep. No. 94-168, at 11, 1975 U.S.C.C.A.N. at 1435. In the same report, the Committee explained that it intended that the IEP meetings "be utilized as an extension of the procedural protections guaranteed under existing law to parents of handicapped children." *Id.* By giving parents of children with disabilities the right to participate in the design of the IEP, the EHA gave them a voice in the development of an appropriate education for their child.

Subsequent enactments have consistently expanded parents' rights to contribute to the design and implementation of an IEP. "[T]he concerns of the parents for enhancing the education of their child" must be considered in developing the child's IEP. 20 U.S.C. § 1414(d)(3)(A)(ii). In addition, the IEP must be revised as appropriate to address "information about the child, provided to, or by, the parents." *Id.* § 1414(d)(4)(A)(ii)(III). Under the current codification, parents are full members of the IEP team and decide, for example: who may be excused from IEP meetings, *id.* § 1414(d)(1)(C)(i); whether alternative means of meeting participation, such as video or teleconference, may be used, *id.* § 1414(f); and whether a child's current IEP may be

amended or modified without convening an IEP meeting, *id.* § 1414(d)(3)(D).

In conferring ever-expanding participatory rights upon parents in designing an appropriate education for their child, Congress made clear that parents themselves have a right to ensure that the FAPE provided to the child conforms to the IEP that they themselves have the right to help shape and challenge, if inadequate. This parental right to shape the educational program is independent of a child's right to receive a quality education.

3. Congress gave parents an independent right to their child's FAPE, because Congress recognized that parents themselves have a vested interest in their children with disabilities becoming self-sufficient adults

The IDEA is a civil rights statute based on the congressional recognition that "it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." Pub. L. No. 94-142, § 601(b)(9), 89 Stat. 775; *see also* 150 Cong. Rec. H10013 (daily ed. Nov. 19, 2004) (statement of Rep. Miller) ("For me and for millions of American families, IDEA is more than an education law; it is a pact that never again will we abandon special needs children and cut them off from the educational services they need and deserve."). Improving educational results for children with disabilities is an "ongoing obligation" of the federal government, because education enables "those children to lead productive and independent adult lives." 20 U.S.C. § 1450(1). In fact, preparing children with disabilities for "further education, employment, and independent living" is the policy driving the IDEA guarantee of a FAPE. *Id.* § 1400(d)(1)(A); *see also* 150 Cong. Rec. S11543 (daily ed. Nov. 19, 2004) (statement of Sen. Kennedy) ("America is coming to understand that disabled does not mean unable—that we shortchange our communities when we deny them the gifts and contributions of those with disabilities.").

However, enabling children with disabilities to reach their full potential is also directly in the interest of these children's parents. *See* 150 Cong. Rec. S11543 (statement of Sen. Kennedy) ("America is coming to know what parents of disabled children have known all along—that their children have hopes and dreams, just like every other child—that they have parents who love them and want the best for their children, just like any other parent."); 150 Cong. Rec. H10013 (daily ed. Nov. 19, 2004) (statement of Rep. Miller) ("I was one of the original authors of the legislation in 1975 that made an historic commitment to the special needs children of the country—and their parents—to assure them the opportunity for a public education that would allow them to take full advantage of their gifts and have a full opportunity to participate in American society."). Not only do parents of children with disabilities wish to see their children flourish, parents will bear the primary economic burden of providing for their adult children if the children do not receive an education that prepares them for employment and independent living.

Because the goals of parents and society are aligned in ensuring that children with disabilities receive the education that enables them to become self-sufficient adults, Congress recognized that parents, in partnership with state and local educational agencies, "are in the best position to improve education for children with disabilities and to address their special needs." 20 U.S.C. § 1450(3). Accordingly, Congress gave parents of children with disabilities special rights to effect this educational goal, as well as resources to ensure "parents receive training and information designed to assist the children . . . in preparing to lead productive independent adult lives." *Id.* § 1470(1); *see also id.* §§ 1471(b)(1)(B), 1472(a)(1)(B).

Congress recognized in the IDEA that both parents and society share the goal of children with disabilities attaining self-sufficiency; Congress gave parents rights under the IDEA to effect this goal for their children.

C. The Structure Of The IDEA Affirms The Right of Parents To Make Fundamental Decisions Regarding Their Child's Education

As Judge Roth recognized in her dissent in *Collinsgru*, parents have rights under the IDEA, which

> arise from the special nature of the relationship between parents and their children and from the role of parents in directing their children's education rights and opportunities.... In enforcing their own rights under the Act, parents are also acting on behalf of their child. This is so because parents are responsible for their children's education [and] are entitled to make fundamental decisions regarding that education.

Collinsgru, 161 F.3d at 237 (Roth, J., concurring in part and dissenting in part).

This analysis of the IDEA is borne out by the very structure of the IDEA, which recognizes the important role of parents in ensuring that their child receives an appropriate education. *See* S. Rep. No. 94-168, at 11-12, 1975 U.S.C.C.A.N. at 1435-1436 ("By changing the language of [the provision requiring development of an IEP], the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child."); 132 Cong. Rec. H17611 (daily ed. July 24, 1986) (statement of Rep. Jeffords) ("All children have the right to a free and appropriate education. Parents have the right and responsibility to protect these rights. We must act to retain these rights."). The years of research and experience since the 1975 enactment have "demonstrated that the education of children with disabilities can be made more effective by ... strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home." Pub. L. No. 105-17, § 601(c)(5)(B), 111 Stat. 39 (codified as amended at 20 U.S.C. § 1400(c)(5)(B)). Thus, ensuring that "parents have the necessary tools to im-

prove educational results for children with disabilities" has long been among the central purposes of the IDEA. Pub. L. No. 105-17, § 601(d)(3), 111 Stat. 42 (codified as amended at 20 U.S.C. § 1400(d)(3)).

In discussing the 1997 amendments, the Senate Committee on Labor and Human Resources explained that the procedural safeguards afforded parents under the IDEA "have historically provided the foundation for ensuring access to a free appropriate public education for children with disabilities." S. Rep. No. 105-17, at 25 (1997). By strengthening these safeguards in the 1997 and 2004 amendments, Congress reaffirmed the IDEA's core understanding that the child's right to receive an appropriate education is meaningless without a concomitant parental ability to enforce that right in court, if necessary. *See Maroni*, 346 F.3d at 255-256 ("The interpretation of parents as 'parties aggrieved' [under Subsection 1415(i)(2)(A)] for both procedural and substantive claims is further confirmed by the structure of IDEA, which relies upon the central role played by parents in assuring that their disabled child receives a free appropriate public education." (internal quotation marks omitted)).

Furthermore, limiting parents' right of action to procedural claims would certainly lead to litigation over whether certain claims under the Act are "substantive" or "procedural." As the First Circuit noted in *Maroni*—where the school district did not argue that the IDEA distinguished between substantive and procedural claims—"school districts . . . probably do not wish to spend their defense dollars litigating the issue of what is procedural and what is substantive, or what consequences follow from that determination." *See* 346 F.3d at 253. Congress deliberately elevated substance over form in the IDEA, preferring that resources be spent on the substantive guarantee of a FAPE. *See supra* pp. 17-18; *see also* H.R. Rep. No. 108-77, at 85 (2003) ("Litigation under the Act has taken the less productive track of searching for technical violations of the Act by school districts rather than being used to protect the substantive rights of children with disabilities."); H.R. Rep. No.

108-77, at 86 (mediation and arbitration are encouraged "to speed the resolution time so that children with disabilities obtain the needed services and education in a timely manner").

* * * * *

Nowhere in the IDEA is there a delineation between "procedural" and "substantive" rights of parents. Rather, the IDEA simply gives parents special and independent rights throughout the Act. Legislative history confirms that Congress did so, because it knew that parents had a financial and familial interest in securing a FAPE for their children with disabilities and were the persons best suited to direct and enforce those rights.

III. Nothing In The Legislative History Of The 2004 Amendments To The Act Affects A Parent's Right To Proceed *Pro Se* On Claims To Enforce Rights Under The IDEA

In 2003, the Senate Committee on Health, Education, Labor, and Pensions proposed the following amendment, which explicitly would have permitted parents to proceed *pro se* in federal court:

> Subject to subsection (m), and notwithstanding any other provision of Federal law regarding attorney representation (including the Federal Rules of Civil Procedure), a parent of a child with a disability may represent the child in any action under this part in Federal or State court, without the assistance of an attorney.

S. Rep. No. 108-185, at 225.

With this new language, the Committee explained, it hoped "to clarify that a parent of a child with a disability may represent the child in any action under this part in State or Federal court, without the assistance of an attorney." S. Rep. No. 108-185, at 42. However, this provision was omitted from the final bill without explanation.

As an initial matter, this proposal does not speak at all to the scope of a parent's individual right of action to make a

claim in federal court under the IDEA. But even as it addresses the separate question of a parent's right to prosecute *pro se* a claim brought in the name of the child, one cannot infer from the proposal that the 2004 Congress understood that the existing statute provided either no right or limited rights for parents to proceed *pro se* on behalf of a child. Nor may one infer from the omission of this provision from the final bill that Congress had concluded that this proposal would *expand* the rights available in the predecessor statute and then rejected such an expansion. The failure to enact this proposal is equally consistent with an inference that Congress understood the statute to contain that right already, and that enactment of the proposal would merely be surplusage. Thus, no conclusion may be drawn as to the intent of the 2004 Congress. Failure to enact this or any other proposal cannot be a basis from which one can infer the intent of an earlier Congress. *See Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (stressing "that failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute" (internal quotation marks omitted)).

* * * * *

Interpreting the statute to preclude claims brought by parents challenging the denial of a FAPE in federal court would severely limit the ability of many families to enforce their rights under the IDEA. This would particularly affect families of modest means such as the Winkelmans, who are unable to pay for a private attorney but do not qualify for free legal services or for the appointment of a court-appointed attorney *in forma pauperis*. Such a result would run counter to the history and policies of the IDEA, which intended to ease the financial burden on families of children with disabilities and to ensure that children with disabilities receive the same free and appropriate public education as their peers without disabilities.

CONCLUSION

For the reasons stated herein, the judgment of the Court of Appeals for the Sixth Circuit should be overturned.

Respectfully submitted.

JODY MANIER KRIS
Counsel of Record
LILLIAN HOWARD POTTER
HOLLY S. HOWELL
THERESE LEE
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

DECEMBER 2006

(10)

No. 05-983

IN THE
SUPREME COURT OF THE UNITED STATES

Jacob Winkelman, a minor by and through his parents and legal guardians, Jeff and Sandee Winkelman, *et al.*,
Petitioners

v.

Parma City School District,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of *Amici Curiae* Nat'l School Boards Assoc., American Assoc. of School Administrators, Ohio School Boards Assoc., Buckeye Assoc. of School Administrators, Ohio Assoc. of School Business Officials and Greater Cleveland School Superintendents' Assoc. in Support of Respondents

Francisco M. Negrón, Jr.
General Counsel
Naomi E. Gittins
Thomas E.M. Hutton
Lisa E. Soronen
Nat'l School Boards Assoc.
1680 Duke Street Alexandria,
VA 22314
(703) 838-6722

Julie Carleton Martin
Counsel of Record
Kate V. Davis
Scott, Scriven & Wahoff LLP
50 West Broad Street
26th Floor
Columbus, OH 43215
(614) 222-8686
Counsel for Amici Curiae

QUESTION PRESENTED

To what extent, if any, may a non-lawyer parent of a minor child with a disability proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... **iii-ix**

INTERESTS OF *AMICI CURIAE* **1**

SUMMARY OF ARGUMENT **3**

ARGUMENT **5**

I. Parents do not have a private cause of action to appeal a due process decision to federal court 5

A. Plain reading of the statute does not support a cause of action for parents 5

B. Parents have alternative avenues to pursue any rights they may have under the IDEA 9

C. An alternative reading would lead to absurd results that do not support the purpose of the IDEA 14

II. Lay parents may not represent their child *pro se* in their child's court appeal under the IDEA 18

A. The common law rule prohibiting parent *pro se* representation applies in IDEA cases 18

B. The purpose of the IDEA is served if children have legal representation 23

CONCLUSION **30**

TABLE OF AUTHORITIES

Page

Cases

A.S. v. Board of Educ. for the Town of West Hartford,
47 Fed. Appx. 615 (2d Cir. 2002) 21

Birmingham v. Omaha Sch. Dist.,
220 F.3d 850 (8th Cir. 2000) 20

Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982) 3, 15

Cannon v. Univ. of Chicago,
441 U.S. 677 (1979) 12

Cheung v. Youth Orchestra Found. of Buffalo, Inc.,
906 F.2d 59 (2d Cir. 1990) 20, 29

Collinsgru v. Palmyra Bd. of Educ.,
161 F.3d 225 (3d Cir. 1998) 18

Conway Sch. Dist.,
46 IDELR 208 (Ark. SEA Feb. 17, 2006) 21

Deal v. Hamilton County Bd. of Educ.,
392 F.3d 840 (6th Cir. 2004) 19

Doe v. Board of Educ. of Baltimore Cty.,
165 F.3d 260 (4th Cir. 1998) 14, 25

Ford v. Long Beach Unified Sch. Dist.,
461 F.3d 1087 (9th Cir. 2006) 25

Gonzaga Univ. v. Doe,
536 U.S. 273 (2002) 12, 13

Guajardo v. Luna,
432 F.2d 1324 (5th Cir. 1970) 18

Harris v. Apfel,
209 F.3d 413 (5th Cir. 2000) 20

Herrera-Venegas v. Sanchez-Rivera,
681 F.2d 41 (1st Cir. 1982) 18

Howey v. Tippecanoe Sch. Corp.,
734 F. Supp. 1485 (N.D. Ind. 1990) 24

Iannaccone v. Callahan,
142 F.3d 553 (2d Cir. 1998) 25

Johns v. County of San Diego,
114 F.3d 874 (9th Cir. 1997) 20

Kay v. Ehler,
499 U.S. 432 (1991) 25

Kirkpatrick v. Lenoir Cty.,
216 F.3d 380 (4th Cir. 2000) 19

Lamoine Sch. v. Ms. Z,
353 F. Supp. 2d 18 (D. Me. 2005) 19

Machadio v. Apfel,
276 F.3d 103 (2d Cir. 2002) 20

Maldonado v. Apfel,
55 F. Supp. 2d 296 (S.D.N.Y. 1999) 20

Meeker v. Kercher,
782 F.2d 153 (10th Cir. 1986) 20

Morgan v. Potter,
157 U.S. 195 (1895) 7

Navin v. Park Ridge Sch. Dist.,
270 F.3d 1147 (7th Cir. 2001) 16

Osei-Afriye v. Medical College of Penn.,
937 F.2d 876 (3d Cir. 1991) 20

Pachl v. School Bd. of Anoka-Hennepin Indep.
Sch. Dist. No. 11, 453 F.3d 1064 (8th Cir. 2006) 23

Schaffer v. Weast,
126 S.Ct. 528 (2005) 5, 12, 19, 25

Scokin v. Texas,
723 F.2d 432 (5th Cir. 1984) 20

Sellers v. School. Bd. of the City of Manassas,
141 F.3d 524 (4th Cir. 1998) 10

S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.,
448 F.3d 601 (2d Cir. 2006) 25

Tindall v. Poultney High Sch. Dist.,
414 F.3d 281 (2d Cir. 2005) 29

Tokarcik v. Forest Hills Sch. Dist.,
665 F.2d 443 (3d Cir. 1981) 20

Wagner v. Board of Educ. of Montgomery Cty.,
340 F.Supp. 2d 603 (D. Md. 2004) 24

Wenger v. Canastota Cent. Sch. Dist.,
146 F.3d 123 (2d Cir. 1998) 29

Woodside v. School Dist. of Phila. Bd. of Educ.,
248 F.3d 129 (3d Cir. 2001) 25

Statutes and Regulations

20 U.S.C. § 1221e-3 13
20 U.S.C. § 1232g *et seq* 12
20 U.S.C. § 1400 *et seq* 1
20 U.S.C. § 1400(d)(1)(A) 3, 15
20 U.S.C. § 1401(23) 15
20 U.S.C. § 1401(23)(C) 15, 16
20 U.S.C. § 1412(a)(1)(A) 7
20 U.S.C. § 1414(d) 24
20 U.S.C. § 1414(d)(1)(B) 5
20 U.S.C. § 1414(e) 5
20 U.S.C. § 1415(b)(1) 5
20 U.S.C. § 1415(b)(6)(A) ..... passim
20 U.S.C. § 1415(b)(7)(A) 6
20 U.S.C. § 1415(b)(7)(A)(ii)(III) ..... passim
20 U.S.C. § 1415(c)(2)(B)(i)(I) 6
20 U.S.C. § 1415(e) 13
20 U.S.C. § 1415(f)(1)(A) 7
20 U.S.C. § 1415(f)(1)(B) 19
20 U.S.C. § 1415(f)(1)(C) 27
20 U.S.C. § 1415(f)(2)(F) 13
20 U.S.C. § 1415(f)(3)(B) 6
20 U.S.C. § 1415(f)(3)(E)(i) 3, 7, 8
20 U.S.C. § 1415(f)(3)(E)(ii) 8
20 U.S.C. § 1415(g)(1) 3, 8

20 U.S.C. § 1415(i)(2)(A) 3, 9
20 U.S.C. § 1415(i)(2)(C) 19
20 U.S.C. § 1415(i)(3)(B)(i)(II) 22
20 U.S.C. § 1415(i)(3)(B)(i)(III) 22
20 U.S.C. § 1415(k)(3)(A) 6
20 U.S.C. § 1415(k)(3)(B)(ii) 6
20 U.S.C. § 1417(c) 10, 13
28 U.S.C. § 1654 17
Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 1

34 C.F.R. § 300.151(a) 10
34 C.F.R. § 300.151(a)(1) 10
34 C.F.R. § 300.151(b) 10
34 C.F.R. § 300.152(c) 10
34 C.F.R. § 300.153 10
34 C.F.R. § 300.619 10
34 C.F.R. § 300.621 10

Legislative History

H.R. Rep. No. 108-77 (2003) 8
S. Rep. No. 208-185 (2003) 8

Other Authorities

Brief of National Disability Rights Network as Amicus Curiae Supporting Petitioners, *U.S. v. Georgia*, 546 U.S. 151 (2006) (Nos. 04-1203 and 04-1236) 28

Center for Special Education Finance, "SEEP" Special Education Expenditure Report, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000* (2003) 26

David Gruber, *Communication and Conflict Resolution Skills Can Lead to Lasting Relationships for Children, Focus on Results, available at* www.cenmi.org/focus/dispute/article_05-02.asp 26

Dr. Howard Schrag and Dr. Judy Schrag, *Dispute Resolution (DR) Procedures, Data Collection, and Caseloads* (2003), *available at* www.directionservice.org/pdf/Dispute%Resolution%20Study.pdf 11

Fed. R. Civ. P 17(b) 29

Fed. R. Civ. P. 17(c) ..... *passim*

Fed. R. Civ. P. 55(b)(2) 29

GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate, *Special Education: Numbers of Formal Disputes are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897) (2003) 11, 27

Lynn M. Daggett, Perry A. Zirkel, LeeAnn L. Gurysh, *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. Mich. J.L. Reform 717 (2005) 15, 22, 27

NSBA, *Priority Issue: Federal Funding for Education* (Jan. 2006), *available at* www.nsba.org/site/docs/35100/35033.pdf 26

Ohio's Part B State Performance Plan (SPP) for 2005-2010 (November 20, 2005), *available at* www.ode.state.oh.us/GDTemplates/Pages/ODEDetail.aspx?page=3&Topic RelationID=968&Content=16899 12

Table 1.1 *Children and Students Served Under IDEA, Part B, by Age Group and State: Fall 2005, available at* www.ideadata.org/tables29th/ar_1-1.htm 7

U.S. Dep't of Educ. Twenty-Fourth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (2002)..... 26

INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's over 95,000 school board members. The NSBA Council of School Attorneys is the national professional association for attorneys who represent school districts. The Ohio School Boards Association ("OSBA"), founded in 1955, is a private, not-for-profit statewide organization of public school boards. OSBA currently has 99.9% membership from Ohio public schools. OSBA's purpose is to encourage and advance public education through local citizen responsibility.

NSBA and OSBA recognize that all children, including those with disabilities, have a right to be provided with a free appropriate public education ("FAPE"). Both organizations have consistently supported the rights of disabled children. At the same time, NSBA and OSBA are fully cognizant of the financial and human resources that their members devote each and every year to the education of disabled children. These resources are above and beyond the partial funding provided by the federal government for the education of students with disabilities pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2006) ("IDEA").[2]

---

[1] Consistent with Rule 37.6 of this Court, *Amici* submit that no counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. This brief is filed with the consent of both parties.

[2] Congress reauthorized and amended the IDEA in 2004 at Pub. L. No. 108-446, 118 Stat. 2647. Citations are to the statute as amended in 2004 unless otherwise indicated.

The American Association of School Administrators ("AASA") is a professional organization of over 14,000 educational leaders across the United States and in other countries. AASA supports school district leaders who are dedicated to quality public education in their communities.

The Buckeye Association of School Administrators (BASA) is a professional organization of school administrators in Ohio and has 826 members. BASA's mission is to support and inspire its members, develop exemplary school system leaders and advocate for public education.

The Greater Cleveland School Superintendents' Association ("GCSSA") is a regional superintendents association whose membership comprises approximately 90 superintendents from Northeastern Ohio.

School administrators play an important role in the day-to-day enforcement and implementation of state and federal laws, including the IDEA. As such, members of AASA, BASA and GCSSA are integrally involved in ensuring that children with disabilities receive a FAPE. School administrators understand the collaborative nature of the education process for children with disabilities and understand that there have to be avenues available when there are disagreements about a child's education. AASA, BASA and GCSSA believe that the due process complaint procedure should be reserved for disagreements relating to a child's education. Further, these organizations are concerned that parents should not be put in the position of representing their children in federal court. Rather, parents should be able to remain focused on working with their school districts about the current educational needs of their children. Further, children are entitled to competent counsel to protect their interests and to allow any court action to proceed in an efficient and effective manner.

The Ohio Association of School Business Officials ("OASBO") is a not-for-profit educational management

organization dedicated to learning, utilizing, and sharing the best methods and technology of school business administration. OASBO has over 1000 members, made up of individuals employed in the fiscal management of schools. OASBO members manage the financial responsibility of school districts to educate all children, including children with disabilities. OASBO members understand and are concerned about the heavy financial burden of special education court litigation, particularly when non-lawyers are representing parties to the litigation.

SUMMARY OF ARGUMENT

The purpose of the IDEA is to provide disabled children with a free appropriate public education. *See* 20 U.S.C. § 1400(d)(1)(A); *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 179 (1982) ("The Act represents an ambitious federal effort to promote the education of handicapped children."). Children are the focus of the Act and the focus of due process complaints and any appeals of those complaints to federal court.

The plain reading of the IDEA provides that due process complaints are to be brought about problems of the child—not the parents. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III). The impartial hearing officer's decision at the administrative level is limited to a determination of whether the child received a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i). Any resulting appeal to the State educational agency ("SEA") and then to court must be limited to the issues raised in the due process complaint, that is, the problems of the child. 20 U.S.C. §§ 1415(g)(1), (i)(2)(A). Accordingly, parents have no independent private cause of action and cannot represent themselves *pro se* in any federal court action.

While parents cannot bring their own claims in federal court, they do have other avenues to pursue their

concerns under the IDEA. They can request a records hearing, bring a state complaint or request mediation. Such avenues provide possible remedies for parents and have been used frequently by parents with positive results for children, parents and school districts.

Children do have private causes of action under the IDEA to appeal a due process decision to federal court. Minor children need to have a next friend under Federal Rule of Civil Procedure 17(c) to bring such an action, and the child's parents can serve as that next friend. The parent, however, cannot represent the child *pro se*. When enacting the IDEA, Congress did not explicitly overrule the common law principle that a next friend cannot represent a child *pro se*. Such a prohibition is appropriate in IDEA cases given the complex nature of special education litigation and the fact that parent and child interests may not always align. Further, even while a federal court action is pending and thereafter, the Act expects parents and school districts to continue to work together on behalf of the child. Children need parents who are able to focus on their current and future education and competent representation by attorneys in federal court to address concerns about their past education. In addition, children, courts and school districts all deserve an effective and efficient legal process. Given the limited number of due process decisions appealed to federal court, legal representation is available to children through private attorneys and Protection and Advocacy organizations.

ARGUMENT

I. Parents do not have a private cause of action to appeal a due process decision to federal court.

A. Plain reading of the statute does not support a cause action for parents.

Parents have rights under the IDEA. *See Schaffer v. Weast*, 126 S.Ct. 528, 532 (2005) (noting examples of parental rights).[3] For example, parents have the right to be a member of their child's individualized education program (IEP) team, 20 U.S.C. § 1414(d)(1)(B); to be included in any group that makes decisions on the educational placement of their child, 20 U.S.C. § 1414(e); and to examine any records relating to their child, 20 U.S.C. § 1415(b)(1). However, the IDEA does not allow parents to pursue these rights in a due process complaint or a resulting civil action. Due process complaints are limited to disputes involving *the child.*

The IDEA allows a due process complaint to be brought, "with respect to any matter relating to the identification, evaluation, or educational placement *of the child*, or the provision of a free appropriate public education *to such child*." 20 U.S.C. § 1415(b)(6)(A) (emphasis added). This section makes no reference to claims being brought about the parents' rights under the IDEA. The IDEA goes on to require that a complaint include the following information: 1) the name of the child, the address of the residence of the child and the name of the school the child is attending; 2) in the case of a homeless child, available contact information for the child and the name of the school the child is attending; 3) "a description of the nature of *the problem of the child* relating to such proposed initiation or change, including facts relating to such problem;" and 4) a

[3] Respondents have correctly argued that these rights are procedural as opposed to substantive rights. *See* Resp. Br. at 25-32.

proposed resolution of the problem to the extent known and available at the time. 20 U.S.C. § 1415(b)(7)(A) (emphasis added). Again, this statutory language provides that a due process complaint is about a "problem of the child." It makes absolutely no reference to the problems or rights of the parents.[4] The IDEA further provides that a due process hearing will be limited to the issues raised in the complaint unless the other party agrees otherwise, confirming that a due process proceeding will be limited to matters relating to the problems of the child. 20 U.S.C. § 1415(f)(3)(B).

While the IDEA specifically limits due process complaints to a "problem of the child," 20 U.S.C. § 1415(b)(7)(A)(ii)(III), the Act does make reference to parents in the due process procedures. *See, e.g.*, 20 U.S.C. § 1415(c)(2)(B)(i)(1). The United States' brief explains why Congress used the term parent in the due process procedures when the rights really belong to the child. The parents' right to file an IDEA action on the child's behalf results from Rule 17(c) of the Federal Rules of Civil Procedure. Rule 17(c) allows a parent or other guardian to "sue or defend on behalf" of a minor child. The United States reasons that if the child is the "party aggrieved" under the IDEA, then the parent would bring the cause of action on behalf of the child under Rule 17(c). Brief for the United States as Amicus Curiae Supporting Petitioner at 10-11. As the child's "next

---

[4] Due process complaints may also be brought in disciplinary situations, but only in the limited circumstances in which the child's educational placement is affected. 20 U.S.C. § 1415(k)(3)(A) provides that a due process complaint may be brought about a placement decision or the manifestation determination that has been completed. In these situations, a hearing officer's determination is limited to addressing the child's placement. The hearing officer may either order that the child return to the placement from which the child was removed or may order a change in placement to an appropriate interim alternative educational setting. 20 U.S.C. § 1415(k)(3)(B)(ii).

friend," "[i]t is the infant, and not the next friend, who is the real and proper party." *Morgan v. Potter*, 157 U.S. 195, 198 (1895).

The United States' explanation of Congress' use of parent is logical when one reviews the demographic data about children with disabilities. The IDEA provides that children between the ages of 3 and 21, inclusive, are entitled to a FAPE, 20 U.S.C. § 1412(a)(1)(A); however, very few children served by IDEA are 18 or older. Data collected by the U.S. Department of Education, Office of Special Education Programs from the 50 states, the District of Columbia and outlying areas show that in the fall of 2005, only 4.7% of the students served under the IDEA were 18 or older. Table 1-1. *Children and Students Served Under IDEA, Part B, by Age, Group and State: Fall 2005, at* https://www.ideadata.org/tables29th/ar_1-1.htm. That means that 95.3% of all students served under the IDEA would need to have a next friend bring the child's cause of action under Rule 17(c). With this overwhelming number of minors receiving special education services, it is not surprising that Congress would refer to their parents when describing the due process procedures.

After an impartial due process hearing is held pursuant to 20 U.S.C. § 1415(f)(1)(A), the impartial hearing officer must make a decision "on substantive grounds based on a determination of whether *the child* received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i) (emphasis added). Petitioners and their *amici* spend considerable effort addressing procedural versus substantive claims in due process proceedings and how those rights may belong to parents. However, such issues, in the context of due process complaints, are only relevant as they relate to *the child*. In the 2004 amendments to the IDEA, Congress delineated the relative importance of procedural issues in the context of the substantive rights of the child. As indicated above, the hearing officer's decision is made on "*substantive*

grounds" based on whether "*the child*" received a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i) (emphasis added). If procedural violations are alleged, then the hearing officer "may find that *a child* did not receive a [FAPE]" only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process, or caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii) (emphasis added). Thus the parents' opportunity to participate in the decisionmaking process is not a separate cause of action in a due process complaint; rather, it is evidence that can be submitted in support of an argument that the child did not receive a FAPE.

The *amici* brief by members of Congress unintentionally supports this focus on the rights of the child—not parents. The brief asserts that Congress elevated substance over form in the IDEA but in so doing cites to legislative history found at H.R. Rep. No. 108-77, at 85 (2003): "Litigation under the Act has taken the less productive track of searching for technical violations of the Act by school districts rather than being used to protect *the substantive rights of children* with disabilities" (emphasis added). Brief for Senator Edward Kennedy et al. as Amici Curiae Supporting Petitioners at 26. *See also,* S. Rep. No. 208-185, at 41-42 (2003).

After the impartial hearing officer's decision, the aggrieved party may appeal the findings and the decision to the SEA. 20 U.S.C. § 1415(g)(1). The focus of Petitioners and their *amici* on the "aggrieved party" language in the Act is a red herring. The focus should be that the appeal to the SEA does not allow the issues in the due process proceedings to expand or change. The appeal is limited to the impartial hearing officer's decision as it relates to the complaint. *Id.* Similarly, a civil action is limited to the underlying complaint brought to initiate the due process proceeding. 20 U.S.C. § 1415(i)(2)(A). Accordingly, the

federal court action is limited to the issues raised in the complaint, which as indicated above, are limited to the problems of the child. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III). Just as the United States suggests, the child is the "aggrieved party," with the parent as the next friend.

A plain reading of the statute indicates that the IDEA provides that due process complaints are about the child. Due process complaints are not about claims that parental rights—whether procedural or substantive—have been violated. Accordingly, this statutory language simply cannot support a conclusion that parents have an independent cause of action to bring a due process complaint on their own behalf to the administrative level or ultimately to federal court. Parents may only bring civil actions in federal court on behalf of their child under Federal Rule of Civil Procedure 17(c) since only the problems of the child may be raised in a complaint appealed through a civil action.

B. Parents have alternative avenues to pursue any rights they may have under the IDEA.

While parents cannot bring a due process complaint about any rights they may have under the Act, they do have other avenues of redress available to them under the IDEA and its implementing regulations. Indeed, as discussed below, some of these other avenues have been used more effectively than due process proceedings.

1. With respect to parental rights about their child's educational records, Congress directed the Secretary to take appropriate action to ensure the confidentiality of any personally identifiable data, information and records. 20 U.S.C. § 1417(c). Regulations promulgated on August 14, 2006 include the parents' right to request a hearing before the school district to challenge information in education

records in certain circumstances. 34 C.F.R. § 300.619. These hearing procedures are completely separate and distinct from due process hearings. *See* 34 C.F.R. § 300.621.

2. The regulations also provide another forum for parents to bring disagreements: through the SEA complaint procedure. 34 C.F.R. § 300.151(a)(1). SEAs are required to have a procedure in place to address complaints brought by *any* organization or individual (including parents) alleging a violation of *any* requirement under Part B of the Act. 34 C.F.R. § 300.151, .153. Such complaints are not limited to problems of the child and the issues raised in a due process complaint. *Id.*; *see also* 34 C.F.R. § 300.152(c).[5]

The SEA is charged with resolving the complaint. 34 C.F.R. § 300.151(a). If the SEA finds a failure to provide appropriate services, then the SEA must address the failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and appropriate future services for all children with disabilities. 34 C.F.R. § 300.151(b). These remedies are as extensive, if not more extensive, as those available in due process proceedings.[6]

The General Accounting Office has noted that state complaints are generally much less expensive to school

---

[5] Parents may also choose to file a due process request on behalf of their child on the same subject about which they are bringing a complaint; however, the SEA will set aside the part of the state complaint addressed in the due process hearing until the conclusion of that hearing. 34 C.F.R. § 300.152(c).

[6] Judgments in IDEA cases are directed at children and their educational rights. *See, e.g., Sellers v. Sch. Bd. of the City of Mannasas*, 141 F.3d 524, 527 (4th Cir. 1998) ("Compensatory or punitive damages would transform the IDEA into a remedy for pain and suffering, emotional distress, and other consequential damages caused by the lack of a free appropriate public education. Such a result would be inconsistent with the structure of the statute, which so strongly favors the provision of and, where appropriate, the restoration of educational rights.").

districts, parents, and SEAs than due process hearings. GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate, *Special Education: Numbers of Formal Disputes are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* (GAO-03-897) at 7 (2003) ("GAO Report"). One study has estimated that for the 2000-2001 school year, more decisions were reached in state complaints than in due process hearings. Dr. Howard Schrag and Dr. Judy Schrag, *Dispute Resolution (DR) Procedures, Data Collection, and Caseloads* (2003), *at* www.directionservice.org/pdf/Dispute%20Resolution%20Study.pdf. Specifically, the study estimates that 7,874 state complaints were filed in 2000-2001, with 5,126 decisions being rendered. The total number of due process hearings requested was estimated at 12,914, with only 3,593 decisions.

3. Mediation is another forum available to parents. 20 U.S.C. § 1415(e) requires that mediation be available to resolve disputes about "*any matter,*" including due process complaints (emphasis added). This is markedly broader than the reasons for which a due process complaint may be brought, which, as indicated above, must be about matters involving the child.

Mediation is a successful alternative resolution process. In the 1999-2000 school year, more formal disputes were resolved through mediation than through due process hearings. GAO Report, *supra*, at 15. To further illustrate the success of mediations, in the Winkelmans' home state of Ohio, 98 mediations were held in the 2004-2005 school year: 59 were related to a due process complaint, while 39 were not. 84.3% of the mediations resulted in a resolution with a mediated agreement. Ohio's Part B State Performance Plan (SPP) for 2005-2010, at 129 (November 30, 2005), http://www.ode.state.oh.us/GD/Templates/Pages/

ODE/ODEDetail.aspx?page=3&TopicRelationID=968&Content=16899.[7]

Mediations also have other beneficial byproducts. The GAO found in conversations with officials from four states, including Ohio, that mediation offered benefits to all parties involved. Specifically, state officials said that mediations help foster communications between schools and parents and strengthen relationships. Also, mediations resolved disputes more quickly than state complaints or due process hearings. GAO Report, *supra*, at 18. In *Schaffer v. Weast*, 126 S.Ct. at 532, the Court recognized that the "cooperative process . . . between parents and schools" is at the core of the IDEA. Mediation provides this opportunity effectively.

4. It was these kinds of alternative avenues that the Court considered in its decision that there is no private cause of action, for either children or parents, under the Family Educational Rights and Privacy Act. 20 U.S.C. § 1232g *et seq.* ("FERPA"). *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). Like the IDEA, FERPA is Spending Clause legislation. *Gonzaga Univ.*, 536 U.S. at 278.[8] "For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" *Id.* at 284 (quoting, *Cannon v. University of Chicago*, 441 U.S. 677, 692, n.13 (1979)). The Court noted, for example, that Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 created individual rights because those statutes had "an *unmistakable focus* on the benefited class." *Id.* As indicated above, under the IDEA disabled children are the benefited class in due process complaints. Due

---

[7] It should be noted that due process hearings are fairly uncommon in Ohio. In 2004-05, there were 184 requests for due process, but only 15 impartial due process hearing decisions were issued that year. *Id.* at 122.

[8] Respondents discuss further how a Spending Clause analysis of the IDEA results in a conclusion that non-lawyer parents may not proceed *pro se* in federal actions under the IDEA. Resp. Br. at 40-49.

process complaints are to be brought about disabled children and their problems. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III).

In *Gonzaga,* the Court recognized that certain rights had been put in place in FERPA for parents and students. These protections, however, did not result in the rights being enforceable in a court of law. *Gonzaga Univ.*, 536 U.S. at 288. The Court observed that Congress had chosen other avenues to enforce the rights, specifically the establishment of a review board. The Secretary of Education created the Family Policy Compliance Office that investigates complaints brought by students and parents who suspect a violation of FERPA. *Id.* The Court concluded that this federal review mechanism under FERPA "further counsel[s] against our finding a congressional intent to create individually enforceable private rights." *Id.* at 290.[9]

Like FERPA, the IDEA provides federal review mechanisms for parents who allege that their rights have been violated. Contrary to the views of Petitioners and their *amici*, a holding that parents do not have a private cause of action in federal court under the IDEA to enforce their own rights would not leave parents without redress. They would still maintain the rights to demand a records hearing, bring a state complaint or request mediation. 20 U.S.C. §§ 1221e-3; 1415(e), 1415(f)(2)(F), 1417(c).

C. An alternative reading would lead to absurd results that do not support the purpose of the IDEA.

1. With the exception of the United States, Brief for the United States at 10-11, n. 3, Petitioners and their *amici*

---

[9] The Court further stated, "We need not determine whether FERPA's procedures are 'sufficiently comprehensive' to offer an independent basis for precluding private enforcement, due to our finding that FERPA creates no private right to enforce." *Id.* (citations omitted).

have wrongly concluded that the use of "parent" in the due process section of the Act means that parents have their own private cause of action to bring a due process complaint and any resulting civil action in federal court. Such a reading, however, would lead to absurd results.

As discussed in Part I.A., *supra*, the logical reading of parent in the due process section of the Act is that it means the parent is bringing the cause of action on behalf of the child under Rule 17(c). If "parent" actually means that it is the parent who has the right to bring the cause of action on his or her own behalf, then the child gets lost in the process. *See Doe v. Board of Educ. of Baltimore Cty.*, 165 F.3d 260, 263 (4th Cir. 1998) ("The references to parents are best understood as accommodations to the fact of the child's incapacity. That incapacity does not collapse the identity of the child into that of his parents."). The logical extension of Petitioners' reading would be that, indeed, the child's rights do collapse into the parents' and only parents may bring due process complaints. This would effectively extinguish any right a child would have (presumably with a next friend under Rule 17(c)) to bring an action under the IDEA for that child's rights. The child would have to rely solely on a parent to choose what claims to bring or not to bring. Such a reading would be contrary to the purpose of the IDEA. The IDEA was not enacted to serve the interests or rights of parents. The first purpose identified by Congress in the IDEA is: "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A).

The Petitioners' reading of the statute skews the focus of the IDEA from children to parents. While parents are an important part of the educational process, their rights under the Act are not an end unto themselves. Instead, those

rights are simply one component of an Act, the purpose of which is to provide children with a FAPE. *Rowley*, 458 U.S. at 179 ("The Act represents an ambitious federal effort to promote the education of handicapped children.") Commentators have summarized the parents' role in meeting this legislative purpose as being "utilitarian," specifically, "to enhance the effectiveness of their children's educational programs, rather than as a substantive right of parenting or a special form of parents' rights to raise their children as they see fit." Lynn M. Daggett, Perry A. Zirkel, LeeAnn L. Gurysh, *For Whom The School Bell Tolls But Not The Statute of Limitations: Minors and the Individuals With Disabilities Education Act*, 38 U. Mich. J.L. Reform 717, 728 (2005) (citations omitted). As discussed in Part I.A., *supra*, Congress limited due process complaints to problems of a child. 20 U.S.C. §§ 1415(b)(6)(A), (b)(7)(A)(ii)(III). To read "parent" to mean anything but acting as the next friend of the child would misread the statute and the purpose behind it.

2. To read "parent" as meaning more than the parent bringing the claim on behalf of the child would lead to expanded litigation. Petitioners and their *amici* all but ignore the definition of "parent" in the IDEA. The term parent includes a natural, adoptive or foster parent, a guardian, a surrogate parent or an individual who is legally responsible for the child's welfare. 20 U.S.C. § 1401(23). Parent also means "an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives." 20 U.S.C. § 1401(23)(C). The Act does not limit the definition of parent to one who has custody. The Act also does not give a hierarchy of parental rights, that is, it does not say that a biological parent's opinion trumps that of a stepparent or grandparent. Under the Petitioners' reading, any of these individuals–grandparents, stepparents, or other relatives—could have a right to bring a due process complaint on their

own behalf, regardless of what may be in the best interest of the child or the opinion of a custodial parent.

School districts are often caught in the middle of heated and passionate disagreements between divorcing parents, parents and stepparents, and parents and grandparents over what is in the best interest of the child. With Petitioners' reading of the Act, these disagreements would play out in federal court. For example, a non-custodial parent, with no rights to make educational decisions, could bring his own lawsuit in federal court under the IDEA. The school district would be forced to defend itself in that lawsuit even though the custodial parent had not brought a due process complaint about the child's education.

This was exactly the result in *Navin v. Park Ridge Sch. Dist.*, 270 F.3d 1147 (7th C.r. 2001). The father, the non-custodial parent, brought a due process request on his own behalf and on behalf of his son. The mother, the custodial parent, was not a party to the lawsuit. Under the divorce decree, the child's mother had the right to make educational decisions. The father maintained the right to inspect education records, communicate with school staff and participate in school activities. *Id.* at 1149. The Seventh Circuit recognized that the father's claims could be contrary to the mother's, but held that the father had a right to proceed. The court remanded the case to the district court to determine whether the father's claims were incompatible, not with the divorce decree itself, but with the mother's use of her rights under the decree. *Id.* at 1149-50. On remand the district court would presumably have to determine what interests the mother, a non-party, had in the claim and then how those interests related to the father's interests and whether he could proceed with his claim. All the while, the school district would have to be party to a federal court proceeding with all the attendant costs. *See* discussion at Part II.B.2., *infra*. Such litigation focuses on the squabbles of the adults and leaves out the interest of the child.

Under Petitioners' reading, all of these "parents," including grandparents, stepparents and non-custodial parents, would also have the right to bring actions *pro se* to federal court. As a result, a school district could possibly face two court actions (or more) about the same child, where one "parent" claims that a child needs a certain educational plan and another "parent" claims that the child needs the exact opposite. Having diametrically opposed claims in federal court does not serve a child's interest. Such a possibility only results in more legal costs for school districts. This is not the result intended by the Act. The due process complaint is supposed to be about the child. "Parents" cannot be parties to federal court actions able to conduct their own cases under 28 U.S.C. § 1654. Parents can sue solely on behalf of their child to protect their child's interests under the IDEA. This is the plain meaning and purpose of the Act.

II. Lay parents may not represent their child *pro se* under the IDEA.

A. The common law rule prohibiting parent *pro se* representation applies in IDEA cases.

As indicated above, children have a cause of action to bring a due process complaint to federal court. Minor children must bring such a claim through their next friend under Rule 17(c). However, that next friend cannot represent the child *pro se*. Under common law, a non-lawyer may not represent another person in court. *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982); *Guajardo v. Luna*, 432 F.2d 1324 (5th Cir. 1970). *See* Resp. Br. at 9-12.

1. The common law prohibition against *pro se* representation of others is borne out of valid policy considerations, including the state's interest in regulating the practice of law, and the fact that attorneys are subject to professional and ethical standards that lay persons are not. *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (3d Cir. 1998). Particularly in the complex world of IDEA litigation, a lack of regulation of *pro se* parents leads to problems not only for the children being represented (*see* Part II.A.3., *infra*), but also for school districts trying to defend against their claims and, not least for the courts adjudicating these cases.

2. Petitioners focus on the fact that the IDEA does allow parents to proceed *pro se* at the administrative hearing level. This reflects the intent of the law to foster a collaborative process between parents and school districts. As discussed above, the IDEA expects parents and school districts to work cooperatively. The IDEA administrative due process proceedings are designed to encourage this cooperation even though the parties are in disagreement.

For example, within a short period of time after a due process complaint is filed, parents and school districts are to meet in a resolution session to attempt to resolve the complaint. 20 U.S.C. § 1415(f)(1)(B). Lawyers are discouraged from attending this meeting. *Id.* If the matter proceeds to hearing, the hearing is less formal than a court proceeding. "IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence." *Schaffer*, 126 S.Ct. at 536. Once the parties go to federal court, however, the dynamics change and the parties should have legal counsel.

The ability of parents to act *pro se* only at the administrative level makes sense as a matter of policy. First, the hearing officers at the administrative level are educational experts. *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 865 (6th Cir. 2004); *Lamoine Sch. v. Ms. Z*, 353 F. Supp. 2d 18, 29 (D. Me. 2005); *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 384 (4th Cir. 2000). Second, the rules of evidence and civil procedure (including discovery) do not apply at the administrative level, so there is less need for legal expertise. Third, the parties can supplement the record at the court level; therefore, if a *pro se* parent makes any mistakes at the administrative level, they may be remedied. 20 U.S.C. § 1415(i)(2)(C). Thus, the administrative level is a more accommodating environment for parents who act *pro se* than court proceedings where the rules of evidence and civil procedure apply and formal discovery occurs. Finally, *pro se* parents have little, if any, knowledge about how IDEA cases operate at the federal court level. Prohibiting their *pro se* representation conserves valuable judicial time and resources.

As Petitioners and their *amici* readily admit, an IDEA federal court appeal is complex litigation. *See* Brief for the United States as Amicus Curiae at 28; Brief of Council of

Parent Advocates and Attorneys et al. as Amici Curiae at 9. IDEA cases are not like the Supplemental Security Income (SSI) disability cases cited by Petitioners. SSI cases are relatively simple legal matters. "[S]uch proceedings do not necessarily present the complexities present in other kinds of actions." *Machadio v. Apfel*, 276 F.3d 103, 109 (2d Cir. 2002).[10] "An appeal from the denial of SSI benefits is a common and fairly simple proceeding that is often prosecuted without the assistance of counsel." *Harris v. Apfel*, 209 F.3d 413, 416 (5th Cir. 2000) (citing *Maldonado v. Apfel*, 55 F. Supp. 2d 296 (S.D.N.Y. 1999)). In contrast, IDEA cases are exactly the types of cases where the need for competent legal representation is great.

IDEA cases are more analogous to tort cases than SSI cases, and courts have consistently held that parents may not represent their children *pro se* in tort cases.[11] Before the 2004 amendments, the IDEA contained no statute of limitations. Consequently, in IDEA cases, courts, looking for the most closely analogous statute of limitations under state law, turned to tort cases. *See Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850, 854 (8th Cir. 2000) (applying a two-year statute of limitations grounded in state tort law); *Scokin v. Texas*, 723 F.2d 432, 436 (5th Cir. 1984) (applying a two-year statute of limitations grounded in state tort law); *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443, 454 (3d Cir. 1981) (suggesting the two-year statute of limitations

---

[10] The *Machadio* court further recognized that even in the social security context, some cases could be of such complexity that a parent should not be allowed to represent his or her child *pro se*. "There will be cases where, for example, the issues are sufficiently significant or complex so that a non-attorney parent will not be able to proceed without compromising the rights of his or her child." 276 F.3d at 108.

[11] *Johns v. County of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997); *Osei-Afriye v. Medical College of Penn.*, 937 F.2d 876, 882-83 (3d Cir. 1991); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986).

applicable to personal injury and medical malpractice actions should govern IDEA appeals). Because tort cases are more analogous to IDEA cases than SSI cases, the same rule prohibiting parental *pro se* representation should apply in both contexts.

Petitioners argue that these tort cases are distinguishable because in the IDEA context the interests of the parents and children will always be aligned. This is a false assumption. In the IDEA context, the interests of the children and parents will not always be consistent. *See* Part II.A.3., *infra*). Therefore, the common law rule prohibiting parent *pro se* representation as upheld in tort cases should also apply in IDEA cases.

3. *Amici* to Respondent acknowledge that most parents act in what they believe to be the best interest of their child. Some parents, however, may be motivated by financial considerations, like tuition reimbursement, or other personal motives, such as in a divorce situation, or may be too emotionally invested in their child's situation to be objective. For example, in a recent state level decision, the hearing officer denied a guardian's request to refer a fifth-grade student with 20/40 corrected vision for placement in a residential facility for blind students. *Conway Sch. Dist.*, 46 IDELR 208 (Ark. SEA Feb. 17, 2006). Such a placement was clearly inappropriate and against the child's best interest. The hearing officer held the school's IEP placement in a regular classroom was proper, noting that the student did not even have a "visual impairment" as defined under Arkansas law. *Id.*

In *A.S. v. Board of Educ. for the Town of West Hartford*, 47 Fed. Appx. 615 (2d Cir. 2002), the parent claimed that the district's plan to transition his son from a residential placement to a public high school did not adequately address his child's needs and proposed a placement at a private, non-special education boarding school. *Id.* at 616. While the parents may have wanted the

school district to pay for boarding school, the court upheld the trial court's determination that the district's placement at its high school would have provided the student with a meaningful educational benefit in the least restrictive environment. *Id.* at 617.

Parents' interests may also not be aligned with those of their children if the parents are divorced. "When there is a divorce and the divorced parents disagree about their child's special education, they lose the ability to be effective advocates for their child." *See* Daggett, 38 U. Mich. J.L. Reform at 739.

Congress recognized that parents have the potential to abuse the IDEA process when it amended the IDEA in 2004 to allow school districts to recover attorney fees. 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III). Congress recognized that some parents may pursue IDEA actions for the wrong reasons, *i.e.*, monetary gain, which demonstrates that the interests of parents and their children are not always the same in the IDEA context. [12]

Sometimes, parents, while well meaning, may have their judgment clouded by emotion or other reasons and reach the wrong conclusions about the educational needs of their children. In the instant case, the parents, presumably motivated by what they thought was in their son's best interest, kept their son out of school programming during the 2004-05 school year while decision after decision found that the school district had offered FAPE. *See* Resp. Br. at 4-6.

---

[12] The possibility of a school district even recovering attorneys' fees from parents appears to be slight. First, courts will likely set a high threshold for recovery. Second, if the statistics offered by *amici* for Petitioners are accurate, some parents involved in special education disputes are of limited financial means. *See* Brief of Ohio Coalition for Education of Children with Disabilities et al. as Amici Curiae Supproting Petitioners at 12; Brief of Council of Parent Attorneys and Advocates et al. as Amici Curiae Supporting Petitioners at 9-12.

In *Pachl v. School Bd. of Anoka-Hennepin Indep. Sch. Dist. No. 11*, 453 F.3d 1064 (8th Cir. 2006), the parents sued the school district when it developed an IEP that provided for their daughter to spend two hours per day in a special education classroom, as opposed to the general education classroom. *Id.* at 1066. The parents insisted that their daughter spend her entire school day in the regular education classroom. *Id.* The school district fought to provide more services in a special education setting, presumably at greater cost to the school district, because the educators involved believed the student would receive a greater benefit from the small structure of the special education class rather than the large, lecture-driven general classroom. *Id.* at 1069. The court of appeals upheld the district court's decision in favor of the school district. This case shows the interest of the child is sometimes harmed when parents make bad educational choices for their child.

B. The purpose of the IDEA is served if children have legal representation.

The purpose of the IDEA—to provide a free appropriate education for children with disabilities—is furthered if children's interests are protected by competent legal counsel. Children in IDEA cases deserve skilled, independent counsel to represent their interests, not only because their parents' interests may not be the same as theirs, as explained *supra*, but also because as courts have recognized, a party is at a disadvantage without independent, third-party representation. Further, requiring independent counsel helps ensure that the collaborative intent of the IDEA will be promoted.

1. Requiring parents to play the role of parent and legal advocate is burdensome for parents and not effective for the child. The IDEA contemplates a collaborative relationship between parents, teachers, and special education

administrators at every step in the development of a student's IEP and the determination of his or her educational placement and services. 20 U.S.C. § 1414(d). Parents and educators need to focus their energies on working together to develop educational programming for the child and not on adversarial legal proceedings. When parents act *pro se*, they must act as zealous advocates in a litigation posture and then later revert to cooperative partners with school officials when the legal proceedings end.[13] These roles are hardly complementary, making it difficult at best for parents to be effective at both.

The collaborative process required under the Act is not easy and requires effort by all parties: "[p]articularly in this difficult area of education for a disabled child, it takes a firm resolve, by parents and educators alike, to work collaboratively, in pursuit of a child's education, even when that collaboration is challenging, choices are limited, and patience runs thin." *Wagner v. Board of Educ. of Montgomery Cty.*, 340 F. Supp. 2d 603, 610 (D. Md. 2004). This process may be daunting and emotionally charged for many parents. *Howey v. Tippecanoe Sch. Corp.*, 734 F. Supp. 1485, 1492 (N.D. Ind. 1990) ("It is understandable that when one is confronted with the frustrations of this kind of disability and the attendant emotional context it may well be a human failing that causes one so situated to want to throw all of the rocks that can possibly be gathered at the school officials involved."). Parents may better serve their child's interests by focusing such emotion and energy on their child's current educational needs in the collaborative process with the school district rather than on legal posturing and litigation strategy.

---

[13] This case is, unfortunately, the perfect example. While litigation has dragged on, the Winkelmans are still meeting with Parma School District officials to try to draft an IEP for Jacob for his present educational needs. If the Winkelmans are allowed to proceed *pro se*, it will hardly set the stage for collaborative, productive IEP meetings in the future.

In court proceedings, an objective, professionally trained attorney may be better able to represent a student's interests than parents who are emotionally invested in the outcome of the case. In the context of denying attorneys' fees for services performed by an attorney-parent who represented his child in an IDEA case, a court held, "Like attorneys appearing *pro se*, attorney-parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that 'reason, rather than emotion' will dictate the conduct of the litigation." *Doe v. Board of Educ. of Baltimore*, 165 F.3d 260, 263 (citing *Kay v. Ehler*, 499 U.S. 432, 437 (1991)); *see also Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1091 (9th Cir. 2006); *S.N. ex rel. J.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 603 (2d Cir. 2006) ("The danger that a parent-attorney would lack sufficient emotional detachment to provide effective representation is undeniably present in disputes arising under the IDEA."); *Woodside v. School Dist. of Phila. Bd. of Educ.*, 248 F.3d 129, 131 (3d Cir. 2001).

2. Allowing parents to proceed *pro se* will increase the already burdensome costs of special education litigation. *See Iannaccone v. Callahan*, 142 F.3d 553, 557 (2d Cir. 1998) (noting *pro se* litigants can "burden the court by filing illogical or incomprehensible pleadings, affidavits and briefs."). An effective legal process is essential to reduce the ever-increasing costs of special education, which are passed on to all students. As this Court has recognized, "there is reason to believe that a great deal is already spent on the administration of the [IDEA]." *Schaffer*, 126 S.Ct. at 535. The United States Department of Education reports that public school systems spent approximately $78 billion educating special education students during the 1999-2000 school year alone. *See* U.S. DEP'T OF EDUC. TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT at I-20 to I-23 (2002). This constitutes

almost 22% of elementary and secondary schools' total spending and is double the amount spent on all other students. *Id.* These costs are borne primarily by state and local governments. While the federal government committed to funding 40% of the per pupil special education costs when it first enacted the predecessor statute to the IDEA in 1975, more than 30 years later, it still funds less than 20 percent of those costs, creating a cumulative funding deficit of more than $59 billion for the last four fiscal years. NSBA, *Priority Issue: Federal Funding for Education* (Jan. 2006), *at* www.nsba.org/site/docs/35100/35033.pdf.

Focusing specifically on dispute resolution, during the 1999-2000 school year, the nation's school districts spent around *$146.5 million* on due process, mediation, and litigation activities for all K-12 special education students in public schools. Center for Special Education Finance, "SEEP" Special Education Expenditure Report, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?*, at v (2003). Of this $146.5 million, districts spent approximately $90.2 million on mediation and due process, and $56.3 million on litigation cases. *Id.* In addition to educational costs, schools spend an average of $8,160-12,200 for each due process hearing or mediation and nearly seven times that on litigation in federal court.[14]

Also, while it has not been specifically suggested, it would not be an effective legal process to toll the statute of limitations until the child reaches the age of majority. First, such tolling would be directly contrary to the IDEA 2004, which requires that requests for due process hearings must be filed by parents or schools within two years of the date the parent or agency "knew or should have known" of the alleged violations. 20 U.S.C. § 1415(f)(1)(C). Second,

---

[14] Other documentation suggests that these estimated costs are closer to $25,000-40,000. *See* David Gruber, *Communication and Conflict Resolution Skills Can Lead to Lasting Relationships for Children, Focus on Results, available at* www.cenmi.org/focus/dispute/article_05-02.asp.

tolling would allow children's problems to persist for years. The school needs to be put on notice of problems in the child's education as soon as possible so that changes can be made to ensure the child receives a FAPE sooner rather than later. Daggett, 38 U. Mich. J.L. Reform at 764. Finally, allowing parents to wait to file claims would "undercut[] the intent and framework of the act and put[] both the child and the school district at risk of untimely proceedings and wasted resource allocation." *Id.* at 765.

3. Petitioners express fear that children with disabilities will not have their "day in court" if their parents cannot represent them *pro se*. *See* Brief of Equal Justice Foundation et al. as Amici Curiae Supporting Petitioner at 12.[15] This fear is unfounded for several reasons. First, the number of IDEA cases actually appealed to court is small due to other forms of dispute resolution such as mediation; therefore, the need for legal representation is not as great as asserted by Petitioners. "Overall, dispute resolution activity was generally low relative to the number of students with disabilities. About 5 due process hearings were held per 10,000 students with disabilities." GAO Report, *supra* at 2. The GAO further noted, "[p]arties that are not satisfied with a due process hearing decision may bring a civil action in federal or state court but such actions are uncommon and were not included in our review. In the 1998-99 school year, an estimated 301 civil actions were initiated nationwide." *Id.* at n. 2.

The Autism Society of America identified 41 private attorneys available to represent students in IDEA claims in just nine states they surveyed. *See* Brief for Autism Society of America, et al. as Amici Curiae Supporting Petitioners at 8. If only 301 suits were initiated nationwide, the 41 attorneys in nine states as asserted by the Autism Society is

---

[15] Congress could have addressed this issue when it reauthorized the IDEA in 2004, but it chose not to do so. *See* Resp. Br. at 15-16.

actually a reasonable number of attorneys to take on these claims.

If, however, in this technical field there really is a dearth of competent private legal counsel as Petitioners and their *amici* assert, the answer is not to turn over these highly complex legal disputes to untrained parents. Rather, Congress has legislated a solution to this problem by creating Protection and Advocacy groups, known as "P&As." The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities. *See* Brief for National Disability Rights Network As Amicus Curiae Supporting Petitioners, *U.S. v. Georgia*, 546 U.S. 151 (2006) (Nos. 04-1203 and 04-1236). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all people with disabilities in a variety of settings. In fiscal year 2004, P&As served over 76,000 persons with disabilities through individual case representation and systemic advocacy. *Id.* at 1. The 301 IDEA civil actions filed in 1998-99 school year would equal less than half of one percent of the total volume of cases handled by P&As. Thus, P&As appear to have the ability to meet the representation needs of special education children and, if not, a modest increase in their funding could provide for such representation.

Second, children have access to the court system through Federal Rule of Civil Procedure 17(c). Under Rule 17, minors are precluded from determining their own legal actions. Rule 17(c) provides that a representative or guardian "may sue or defend on behalf of the infant." Circuit courts have already applied this rule to handle IDEA cases where parents have attempted to proceed *pro se*. For instance, in *Tindall v. Poultney High Sch. Dist.*, 414 F.3d 281 (2d Cir. 2005), the court deferred its decision regarding the merits of the IDEA claims for the limited purpose of permitting counsel to be retained to represent the minor child under Rule 17(c). In support of that conclusion, the court

quoted its own precedent for the proposition that "[t]he choice to appear *pro se* is not a true choice for minors who under state law, see Fed. R. Civ. P. 17(b), cannot determine their own legal actions." *Id.* at 284 (quoting *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) (court remanded civil rights action of daughter so father who acted *pro se* could obtain legal counsel)). *See also Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998) (court held that parent who was not attorney could not appear *pro se* on behalf of child and remanded the case to determine whether child was entitled to attorney under *in forma pauperis* statute).

Finally, Petitioners claim that school districts will be able to appeal unfavorable hearing level decisions to court and obtain default judgments against children unrepresented by counsel. This argument is without merit because such a maneuver is prohibited by Federal Rule of Civil Procedure 55(b)(2), which states: "no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. . . ." The scenario presented by Petitioners of school districts running to court to appeal due process decisions while children are helplessly bound by the judgment cannot occur.

The policy considerations in favor of prohibiting *pro se* representation therefore overwhelmingly outweigh the concerns raised by Petitioners.

CONCLUSION

For the above reasons, *Amici* urge that this Court hold that a non-lawyer parent of a minor child with a disability may not proceed *pro se* in a federal court action under the IDEA.

Respectfully submitted,

Francisco M. Negrón, Jr.
General Counsel
Thomas E.M. Hutton
Naomi E. Gittins
Lisa E. Soronen
Nat'l School Boards Assoc.
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Julie Carleton Martin
Counsel of Record
Kate V. Davis
Scott, Scriven & Wahoff LLP
50 W. Broad St., 26th Fl.
Columbus, OH 43215
(614) 222-8686

Counsel for *Amici Curiae*

964 β

(9)

Supreme Court, U.S.
FILED
DEC 15 2006
OFFICE OF THE CLERK

No. 05-983

IN THE

Supreme Court of the United States

Jacob Winkelman, a Minor, By and Through His Parents and Legal Guardians, Jeff and Sandee Winkelman, et al.,

Petitioners,

v.

Parma City School District,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE OHIO COALITION FOR THE EDUCATION OF CHILDREN WITH DISABILITIES AND THE AUTISM SOCIETY OF OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
(Counsel of Record)
AKIN, GUMP, STRAUSS,
HAUER, & FELD, L.L.P.
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Eric H. Zagrans
ZAGRANS GUFFEY LLC
1401 Eye Street, NW, 7th Floor
Washington, DC 20005

December 15, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF THE *AMICI CURIAE* 1
SUMMARY OF THE ARGUMENT 2
ARGUMENT 4
I. Parents Have Standing to Litigate Their Own Substantive Rights Under the IDEA. 4
A. The Explicit Procedural Rights Guaranteed to Parents by the Act Safeguard Their Substantive Right to a Free Appropriate Public Education for Their Children. 5
B. The IDEA Provides a Substantive Right to Parents By Relieving Them of the Legal Obligation and Considerable Costs of Educating Their Children. 9
II. The Educational Interests of Parents and Their Children Are Inextricably Intertwined. 13
III. Parents Receiving Specialized Training in IDEA Have Proven to Be Powerful, Effective and Successful Advocates for Their Children's Rights to an Appropriate Public Education. 22
CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Baker v. Carr, 369 U.S. 186 (1962) 4
Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) 7
Cavanaugh v. Cardinal Local School District, 409 F.3d 753 (6th Cir. 2005) 4
FEC v. Akins, 524 U.S. 1 (1998) 8
Haase v. Rohrscheid, 6 Ind. 66 (1854) 9
In re Hargy, 23 Ohio N.P. (n.s.) 129 (Ohio C.P. 1920). 10
Meyer v. Nebraska, 262 U.S. 390 (1923) 10
Middleton v. Middleton, 620 A.2d 1363 (Md. 1993) 9
Osborn v. Allen, 26 N.J.L. 388 (N.J. 1857) 9
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 9, 14, 17
Schaffer v. Weast, 126 S. Ct. 528 (2005) 6
Warth v. Seldin, 422 U.S. 490 (1975) 4

Statutes

20 U.S.C. § 1415(b)(6)(A) 6
20 U.S.C. § 1400(c)(3) 4
20 U.S.C. § 1400(d)(1)(B) 4
20 U.S.C. § 1401(29) 11
20 U.S.C. § 1412(a)(1)(A) 10
20 U.S.C. § 1412(a)(10)(C)(ii) 6, 11
20 U.S.C. § 1414(c)(3) 6
20 U.S.C. § 1414(d)(1)(B)(i) 6
20 U.S.C. § 1415 18
20 U.S.C. § 1415(b)(1) 6
20 U.S.C. § 1415(b)(3) 6

20 U.S.C. § 1415(d)(2)(J) 5
20 U.S.C. § 1415(d)(2)(K) 5
20 U.S.C. § 1415(d)(2)(L) 5
20 U.S.C. § 1415(f)(1)(A) 6
20 U.S.C. § 1415(h)(1) 7
20 U.S.C. § 1415(i)(2)(A) 6, 8
20 U.S.C. § 1471(b)(1) 18
20 U.S.C. § 5801 18
20 U.S.C. § 5812(8)(A) 18
20 U.S.C. § 6301(12) 19
20 U.S.C. § 6311(b)(2)(C)(v) 19
20 U.S.C. § 6318 18
28 U.S.C. § 1654 4
Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. ..... passim
Md. Code Ann., Fam. Law § 5-203(b)(1) 9
N.Y. Educ. Law § 3212 10
Ohio Rev. Code Ann. § 3321.38 10
Pub. L. No. 103-382, § 1118, 108 Stat. 3518 18
Pub. L. No. 107-110, § 1118, 115 Stat. 1425 19

Other Authorities

149 Cong. Rec. H3458 11
150 Cong. Rec. H10,006-01 5
150 Cong. Rec. S5250-02 11
Adriana Khoo, *Schools That Welcome Parents: How Schools Can Reach Out to Parents and Create Ways for Them to Participate*, Child Advocate, Jan.-Feb. 2001, *available at* http://www.4children.org/news/101sche.htm 22
Anne C. Dailey, *Developing Citizens*, 91 Iowa L. Rev. 431 (2006) 10

Charles Adamson, *Parents Take on School Districts with Legal Challenges*, http://www.autism-law.com/news.htm#2 13

Chicago Public Schools Parent Community Partnership Workshops, http://www.cps.k12.il.us/Parent/PCP/programs.html#workshops 22

Frederick M. Hess, National School Board Association, School Boards at the Dawn of the 21st Century: Conditions and Challenges of District Governance 28 (2002), *available at* http://www.nsba.org/bookreports/SBDawn21stCent.pdf 17, 19

Houston Indep. Sch. Dist., *Parent Rights and Responsibilities Handbook*, *available at* http://www.houstonisd.org/67806986/images/PRR_Brochure.pdf 20, 21

Interview with Travis Haycock, Assistant Director of the Cleveland Clinic Center for Autism (Nov. 11, 2006) 12

Los Angeles Unified Sch. Dist. Bd. Rules, No. 1370, *available at* http://www.lausd.k12.ca.us/lausd/board/secretary/html/BoardRules11-1-06.pdf 21

Los Angeles Unified Sch. Dist. Bd. Rules, No. 26, *available at* http://www.lausd.k12.ca.us/lausd/board/secretary/html/BoardRules11-1-06.pdf 20

Lynn Newman, *Research Digest: Family Involvement in the Education of Secondary-Age Students With Disabilities*, FINE Network: Harvard Family Research Project (2005) 15

NAPSEC Member Programs Listed by City & State, *available at* http://www.napsec.org/statememberslist.html (last visited November 12, 2006) 12

National Longitudinal Transition Study-2, Family Involvement in the Educational Development of Youth with Disabilities (2005) 16

NCES, Parental and Family Involvement in Education Report, 2002-03 16

NCES, Schools and Staffing Survey, *cited at* http://www.ed.gov/about/offices/list/oii/nonpublic/statistics.html#private 12

New York City Dep't of Educ., Community Education Councils, *at* http://docs.nycenet.edu/docushare/dsweb/Get/Document-87/D-140.pdf 21

Parma City Sch. Dist. Bd. Pol'y Manual, No. 2240, *available at* http://www.parmacityschools.org/board/policies/upload/FullManual.pdf 21

Parma City Sch. Dist. Bd. Pol'y Manual, No. 2111, *available at* http://www.parmacityschools.org/board/policies/upload/FullManual.pdf 20

Parma City Sch. Dist. Bd. Pol'y Manual, No. 2132, *available at* http://www.parmacityschools.org/board/policies/upload/FullManual.pdf 20

PTA National Public Opinion Poll on Education Funding, National PTA 2004 Annual Report 17

Ruggero J. Aldisert, *Tribute to Dean Mark A. Nordenberg: Goodbye Dean, and Welcome Back, Provost-Professor*, 54 U. Pitt. L. Rev. 951 (1993) 13

San Diego Parent University: Parents Helping Children Learn, http://www.sandi.net/parent/ parent.univ/who.htm 22

Susan L. Kessler-Sklar & Amy J. L. Baker, *School District Parent Involvement Policies and Programs*, 101 Elem. Sch. J. 101 (2000) 19

William Blackstone, Commentaries 9

Rules

S. Ct. R. 37.6 1

Regulations

34 C.F.R. pt. 300, App. A 6
Ohio Admin. Code 3301-34-04 10

INTEREST OF THE *AMICI CURIAE*[1]

The Ohio Coalition for the Education of Children with Disabilities (Ohio Coalition) is a state-wide, non-profit organization dedicated to advancing the educational interests of children and youth with various kinds of disabilities, including autism, and to providing their parents with information, training, and other resources so that they may act as effective advocates for their children in intervening with school officials and developing effective curricula and individualized education programs (IEPs).

The Ohio Coalition is composed of over forty-four parent and professional organizations representing over 50,000 individuals. It works with the state legislature, the Office of the Governor, and various state agencies on legislative and policy issues of importance to Ohio's parents of children with disabilities in furtherance of its mission of ensuring that high-quality educational programs and services are available to all children with disabilities in Ohio.

Most significantly for this case, the Ohio Coalition also serves as the regional Parent Technical Assistance Center for the parent centers located in nine states throughout the Midwest. The parent centers established by this federally funded project offer training and advocacy resources to parents of children with disabilities. In 2005, the most recent year for which the data have been compiled, the Ohio Coalition provided workshops for training and advocacy services to over 10,700 parents and professionals. In a state in which there are approximately 274,000 school-aged children with disabilities, the Ohio Coalition had direct contact with, and provided services to, over 40,000 parents and professionals.

---

[1] This brief is filed with the written consent of all parties. Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

The Autism Society of Ohio (ASO) is a chapter of the Autism Society of America, the largest and oldest parent-based autism organization in the United States with over 100,000 members and supporters and over 200 state and local chapters. ASO is dedicated to increasing public awareness about autism and the day-to-day issues faced by individuals with autism, and advocates statewide for improved services for persons with autism and their families throughout Ohio.

Amici maintain that the Sixth Circuit's erroneous construction of the Individuals with Disabilities Education Act, to prohibit the non-lawyer parents of learning-disabled children from litigating *pro se* their children's claims under the Act in federal court, will have profoundly adverse impacts on the ability of thousands of similarly situated parents to enforce their children's rights, and thus will substantially undermine Congress's intended remedial purposes in enacting the legislation. Because thousands of *amici*'s clients would suffer severe adverse consequences if they did not have the right to advocate *pro se* on behalf of their children in federal court litigation, *amici* have a substantial interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

The question presented by this case is whether parents may proceed *pro se* in litigating claims under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.[2] The answer to that question turns on the antecedent determination whether parents may litigate such claims in their own right. If parents are proper parties to such litigation, it follows *ipso facto* that they may proceed *pro se*, for not even Respondent contends that Congress intended to take the extraordinary step of stripping parents in cases under the IDEA of the settled right to vindicate one's rights in court without a lawyer.

---

[2] This brief cites to the current version of the IDEA, which was reauthorized and amended in 2004.

The text and structure of the IDEA demonstrate that parents in cases such as this one are litigating to pursue their own personal interests. The IDEA grants substantive rights to parents, explicitly stating Congress's intent to protect the rights of both parents and their children; the denial of those rights renders the parents aggrieved parties. The IDEA relieves parents of the legal responsibility to educate their children and the substantial financial burden of carrying out that duty. The extensive statutory rights guaranteed to parents by the IDEA safeguard these significant substantive rights. Accordingly, there was no need for Congress to enact a further statutory provision that "could have expressly allowed non-lawyer parents to proceed *pro se*." *Contra* BIO 13. And contrary to Respondent's assertions, this case does not require this Court to decide whether parents can "proceed *pro se* on behalf of their children." BIO 13.

Parents and children share the IDEA's substantive grant of the right to a free and appropriate public education. Parents, especially those with disabled children, are integrally involved in primary and secondary education, engaging in all aspects of the process to improve their children's education. The data reflects active participation by three quarters of parents in the education of their disabled children, often with the substantial encouragement of the school system. Parents also actively participate in the governance of schools, the development of curricula, and the like. Because no principled line can be drawn between the interests of the parents and those of the child, parent-litigants have the right to advance the rights they share with their children.

Experience also demonstrates that parents are also effective advocates on educational issues in court. *Amici* are directly involved in the training of parents with respect to rights under the IDEA. Their experience has been that parents serve as informed, powerful, and effective advocates on these questions.

ARGUMENT

The Winkelmans' argument in this case does not involve a departure from a supposed "common-law ban on lay representation." *Contra* BIO 10. Parents have substantive rights under the IDEA and thus may litigate their own claims. Moreover, because parents share their children's right to a free and appropriate education, they are empowered to assert these substantive rights. Congress expressly stated its intent to guarantee these rights to parents through the IDEA, seeking to "ensur[e] children with disabilities *and the families of such children* access to a free appropriate public education," 20 U.S.C. § 1400(c)(3) (emphasis added), and to "ensure that the rights of children with disabilities *and parents of such children* are protected." § 1400(d)(1)(B) (emphasis added). Given that parents have standing to proceed in court, it follows that they have the right to proceed *pro se*. *See* 28 U.S.C. § 1654 ("[I]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein").

I. Parents Have Standing to Litigate Their Own Substantive Rights Under the IDEA.

To have standing, a plaintiff must allege "a personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Contrary to Respondent's position "'that the right of [*sic*] disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents,'" BIO 20 (quoting *Cavanaugh v. Cardinal Local School District*, 409 F.3d 753, 757 (6th Cir. 2005)), parents have a personal right to the free public education for their children guaranteed by the IDEA. The statute provides a complex statutory scheme for parents to protect this right. Moreover, parents have a significant financial interest in the free education for their children guaranteed by the IDEA and

a legal burden to provide such education in the absence of a public education from the state. To protect their own right to a free appropriate education for their eight-year-old son Jacob, who has autism spectrum disorder, Jeff and Sandee Winkelman have individual standing to assert their own legal rights.

A. The Explicit Procedural Rights Guaranteed to Parents by the Act Safeguard Their Substantive Right to a Free Appropriate Public Education for Their Children.

The panoply of procedural rights that Congress explicitly granted to parents shows that parents are proper parties under the Act and have standing to pursue their own substantive rights in court because, when parents hold explicit procedural rights, it makes little sense to say that they have no substantive right to enforcement of the underlying educational grant.

1. Congress intended the reauthorization of the IDEA, with its extensive grant of parental rights, to "support[] all parents by giving more opportunity for them to be active participants in their children's educational experience," 150 CONG. REC. H10,006-01 (daily ed. Nov. 19, 2004) (statement of Rep. Ehlers), and to "giv[e] greater choice and control to parents and local school districts," *id.* (statement of Rep. Regula).

The IDEA explicitly requires that schools give parents "a full explanation of the procedural safeguards" available to them under the Act, including their right to "[s]tate-level appeals" and "civil actions" and the availability of "attorneys' fees." 20 U.S.C. § 1415(d)(2) (J)-(L). The Act's explicit requirement that parents be notified of their right to file civil actions makes clear that Congress intended that they could be "parties aggrieved" under the statute and able to pursue their own substantive interests.

Furthermore, aside from this notice provision, the Act specifically grants parents the opportunity to be heavily

involved in every step of the Act's implementation. First, the IDEA mandates that parents be members of their child's "IEP team," which develops the child's individualized education program (IEP). 20 U.S.C. § 1414(d)(1)(B)(i). Congress thereby sought to ensure that "[p]arents and guardians play a significant role in the IEP process." *Schaffer v. Weast*, 126 S. Ct. 528, 532 (2005). Moreover, parents must be informed about and consent to evaluations of their child. 20 U.S.C. § 1414(c)(3). Parents are also given access to any records relating to their child, and have the right to obtain an "independent educational evaluation of the[ir] child." § 1415(b)(1). The IDEA further requires that parents receive written notification of any changes to, or refusals to change, a child's IEP. § 1415(b)(3).

Congress also granted parents the right, in turn, to pursue remedies if they were dissatisfied with the process or result of their interaction with the school. If parents believe that the IEP offered by their local school district is not appropriate, they have the right to file administrative complaints with regard to their child's "educational placement," § 1415(b)(6)(A), and are entitled to an "impartial due process hearing" to address those complaints, § 1415(f)(1)(A). "Any party aggrieved by the findings and decision" of a due process or administrative hearing "shall have the right to bring a civil action with respect to the complaint" in state or federal court. § 1415(i)(2)(A). If the school has failed to offer a free appropriate education to the child, "a court or a hearing officer may require the agency to reimburse the parents" for private educational services sought out by the parents. § 1412(a)(10)(C)(ii).

Not only does the IDEA grant rights to parents, it also explicitly authorizes parents to advocate on behalf of their children at every level of this administrative process. Although the IDEA allows parents to be accompanied by counsel at due process hearings, parents may proceed *pro se* or be accompanied by non-attorney "individuals with special

knowledge or training with respect to the problems of children with disabilities." § 1415(h)(1). In fact, at the time relevant to this case, parents were affirmatively discouraged from having counsel attend IEP meetings. *See* 34 C.F.R. pt. 300, App. A ("The presence of the agency's attorney could contribute to a potentially adversarial atmosphere at the meeting. The same is true with regard to the presence of an attorney accompanying the parents at an IEP meeting." (answer to question 29)) (as effective prior to Oct. 13, 2006). Thus, as Respondent must acknowledge, "the IDEA allows parents to represent their children *pro se* during administrative proceedings," BIO 17, and there is no basis for concluding that Congress intended to adopt a much more restrictive role – under which parents would not be able to represent themselves to pursue their own interests under the statute – in court.

2. Procedural and substantive rights under the IDEA go hand in hand; given that parents hold such extensive procedural rights, they therefore must hold a corresponding substantive right to the underlying educational grant. In *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-07 (1982), the Court recognized as much in defining the substantive right to a FAPE as including "State compli[ance] with the [IEP] procedures set forth in the [EHA]," as well as an IEP "reasonably calculated to enable the child to receive educational benefits." *See also* BIO 22 n.18. By acknowledging that the state's obligation to provide a FAPE cannot be met without properly complying with the procedural requirements of the IDEA, the Court recognized that procedural and substantive rights under the IDEA are effectively one and the same.

This case arises from the Winkelmans' effort to invoke their rights under the IDEA to secure appropriate educational services for their son Jacob. The Winkelmans worked diligently and successfully with Respondent as part of

Jacob's IEP team for two years until the 2003-2004 school year, when Respondent proposed moving Jacob from his placement at the Achievement Center for Children, a private preschool specializing in educating children with autism, to a regular elementary school special education class. Pet. App. 4a-5a. Because the Winkelmans were troubled that the new plan excluded many services they regarded as necessary for Jacob's education, they requested a due process hearing to address Respondent's proposed IEP. *Id.* at 5a. When the Impartial Hearing Officer rejected the Winkelmans' complaint, the parents appealed to the State Level Review Office. *Id.* at 6a. Again unsuccessful, the Winkelmans exercised their statutory right to challenge the decision in federal court. *Id.* After the Northern District of Ohio granted judgment on the pleadings for Respondent, the parents appealed to the U.S. Court of Appeals for the Sixth Circuit, which summarily dismissed the suit because of the Winkelmans' status as *pro se* litigants. *Id.* at 1a-2a, 23a.

Accordingly, because the Winkelmans have consistently pursued their own procedural rights under the IDEA and sought to protect the educational interests of their son Jacob, it makes little sense to hold that the Winkelmans do not also have rights with respect to the underlying FAPE and thus cannot continue to advance their rights in court.

This reading of the statute is bolstered by the fact that none of the provisions of the IDEA regarding the right of parents to seek relief in administrative or judicial hearings distinguish between substantive and procedural rights. The phrase "part[ies] aggrieved," 20 U.S.C. § 1415(i)(2)(A), does not create categories of procedural and substantive claims, and parties may be equally "aggrieved" by substantive or procedural harms, *see generally FEC v. Akins*, 524 U.S. 11, 19 (1998) ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly . . .."). No matter whether the result of procedural or substantive violations, this case is about Respondent's denial of

educational services necessary to Jacob's educational development and the resulting cost that his parents must bear to correct this deficiency.

B. The IDEA Provides a Substantive Right to Parents By Relieving Them of the Legal Obligation and Considerable Costs of Educating Their Children.

The IDEA furthermore confers substantive rights upon parents such as the Winkelmans by explicitly assisting them with the disproportionate financial burden of educating children with disabilities. Parents have a common law and statutory obligation to provide for the education of their children. The financial relief thus granted is considerable in light of the extensive costs of obtaining private specialized education for children with disabilities.

Under the common law, and today in the context of public education, parents have always borne the "high duty[] to recognize and prepare [the child] for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Blackstone stated that it is the "duty of parents to their children [to give] them an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any." 1 WILLIAM BLACKSTONE, COMMENTARIES *451. The highest courts of several states have also recognized this common law duty. For example, the New Jersey Supreme Court held that the common law "duties of protection and education" rest upon both parents. *Osborn v. Allen*, 26 N.J.L. 388 (N.J. 1857); *see also Haase v. Roehrscheid*, 6 Ind. 66 (1854) ("It is the duty of a father to support and educate his minor children . . ..").

Many states subsequently enacted statutes, "reflective of the common law," that require each parent to provide for the "child's support, care, nurture, welfare, and education." *Middleton v. Middleton*, 620 A.2d 1363, 1366 (Md. 1993) (citing MD. CODE ANN., FAM. LAW § 5-203(b)(1) (1991)). This Court noted that it is the "natural duty of the parent to give his children education suitable to their station in life,"

and that this obligation is enforced "in nearly all the States . . . by compulsory laws." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Even after states assumed some of the financial burden of parents by providing a public education for every child, parents still retained the ultimate obligation of ensuring their child is educated.[3] Notably, even if Jacob Winkelman were excluded from public schools, Ohio law "still imposes the duty upon [his parents] to give [Jacob] a proper education, and on [their] failure to do so [they] may be prosecuted . . . for such neglect." *In re Hargy*, 23 Ohio N.P. (n.s.) 129 (Ohio C.P. 1920).

Given that the parental duty to educate has not been displaced by modern public education, it is clear that parents have an interest in being relieved of this burden. Accordingly, the free appropriate education granted by the IDEA is best understood as a substantive grant to parents that gives them rights under the Act. By granting a "free appropriate public education" to children with disabilities, 20 U.S.C. § 1412(a)(1)(A), the IDEA explicitly assists parents such as the Winkelmans with fulfilling their duty to educate their children with disabilities and frees them from the substantial financial burden they would otherwise personally carry. When a school district proposes an unsatisfactory IEP, it is the parents of the child who must bear the financial burden of providing educational alternatives or supplements to ensure their child has an appropriate education. For the Winkelmans, this meant obtaining private instruction for Jacob at the costly Monarch School to meet his

---

[3] *See, e.g.*, OHIO REV. CODE ANN. § 3321.38 ("If the juvenile court adjudicates the child as . . . an habitual or chronic truant . . . any subsequent adjudication of that nature involving the child may result in a criminal charge against the parent . . . ."); N.Y. EDUC. LAW § 3212 (stating that parents can lose custody of their children for "educational neglect"). *See generally* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 440 (2006) (noting that by 1918 all fifty states had compulsory education laws).

individualized needs that were not appropriately addressed by Respondent's proposed IEP.[4]

The direct grant of financial relief to parents is referenced several times in the IDEA. The Solicitor General, citing this extensive statutory scheme, has noted that "[t]he language of IDEA confirms that Congress viewed the right to a free appropriate public education as one held jointly by parents and their child." Cert. Br. for the U.S. as *Amicus Curiae*, No. 05-983, at 12. When a school district has failed to provide a free appropriate public education and parents have enrolled their children in private school, "a court or a hearing officer may require the agency to reimburse the parents." 20 U.S.C. § 1412(a)(10)(C)(ii). Likewise, the IDEA defines "special education," a component of a free appropriate public education, as "specially designed instruction, *at no cost to parents*, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29) (emphasis added). Congress recognized that, under the IDEA, "[o]ver six million children with disabilities are no longer limited by their families' ability to afford private education." 149 CONG. REC. H3458, H3479 (daily ed. Apr. 30, 2003) (statement of Rep. Kind).

This substantive relief granted to parents by the Act confers upon them a substantial financial interest in the Act's enforcement. The considerable cost of educating a disabled child was an important impetus behind the IDEA, as there "was a general recognition that to educate a special needs child, it was going to cost effectively double what it costs to normally educate a child in this country." 150 CONG. REC. S5250-02, S5331-02 (daily ed. May 12, 2004) (statement of Sen. Kennedy). In fact, this prediction underestimated the

---

[4] Due to the school's prohibitive cost, the parents have since been required to homeschool Jacob, with one to two hours per week of supplemental instruction provided by the Monarch School.

financial burden on parents in the absence of the IDEA, as private education for children with disabilities costs nearly eight times as much as regular private education. *See* Pet. App. 5a (noting that Monarch School's annual tuition is $56,000).[5] For the Winkelmans, the right to a free education relieves them of the potentially overwhelming cost of enrolling their child in an appropriate private school, which in Ohio ranges from the Monarch School's $56,000 annual tuition to the Cleveland Clinic Center for Autism's $59,000 annual cost.[6]

Indeed, given Congress's expressed interest in relieving parents of tuition costs, it would be inconsistent with the statutory design to read the Act as burdening them with the

---

[5] These costs are particularly weighty for parents of children with disabilities, who already face costs two to three times more than those faced by parents raising a non-disabled child. *See* Madeleine Brindley, *High Cost for a Family Raising a Disabled Child*, WESTERN MAIL, July 7, 2005, http://icwales.icnetwork.co.uk/0100news/health/tm_objectid=15708313&method=full&siteid=50082-name_page.html; Anne E. Kazak & Robert S. Marvin, *Differences, Difficulties and Adaptation: Stress and Social Networks in Families with a Handicapped Child*, 33 FAMILY RELATIONS 67, 71 (1984) (noting that in a study of families with a child having spina bifida the mean income was $17,900 for families including a disabled child, compared with $29,500 for families without a disabled child); SALLY BALDWIN, THE COSTS OF CARING: FAMILIES WITH DISABLED CHILDREN 55-56 (Kathleen Jones ed., 1985) (noting that in one study one-hundred percent of surveyed families with children with disabilities reported extra cost due to the disability).

[6] According to the National Association of Private Special Education Centers, these two schools are the only options for parents of autistic children in Ohio. NAPSEC Member Programs Listed by City & State, *at* http://www.napsec.org/statememberslist.html (last visited December 15, 2006); E-mail from Travis Haycock, Assistant Director of the Cleveland Clinic Center for Autism (Nov. 20, 2006, 12:01:30 PM PST) (on file with author).

substantial further cost of paying legal counsel to protect their right to a free education for their children. The cost of an attorney for an IDEA appeal could run anywhere from $35,000 to $100,000. *See* Charles Adamson, *Parents Take on School Districts with Legal Challenges*, http://www.autism-law.com/news.htm#2 (describing an IDEA appeal in which the parents' attorneys' fees amounted to $100,000); *see also* Ruggero J. Aldisert, *Tribute to Dean Mark A. Nordenberg: Goodbye Dean, and Welcome Back, Provost-Professor*, 54 U. PITT. L. REV. 951, 953 (1993) ("[t]he costs of prosecuting or defending a rather straightforward civil claim – generating attorneys fees of $ 35,000 to $ 50,000 – are beyond the means of the average family or small business"). The cost of counsel in many cases cannot be overcome by the hypothetical prospect that, in a few instances, "children may qualify for court-appointed counsel" or "low-cost or *pro bono* legal services may be available." *Contra* BIO 18. *See* Pet. 14-16; Cert. Br. for the Autism Society of America et al. as *Amicus Curiae*, No. 05-983, at 7-9; Cert. Br. for the Council of Parent Attorneys and Advocates, Inc., et al. as *Amicus Curiae*, No. 05-983, at 9-12. It would be anomalous to read the IDEA – which grants parents a reprieve from thousands of dollars of tuition costs – as requiring them to pay as much to defend that right.

II. The Educational Interests of Parents and Their Children Are Inextricably Intertwined.

Not only do parents have individual standing to advance their own claims, but their rights are inextricably intertwined with those of their children. To improve the education of their children, parents are heavily involved in and retain control over considerable parts of their children's education. This is especially true for parents of children with disabilities, whose involvement in and dedication to their children's education is even higher than that of the general population. Given the intertwined nature of the rights of parents to have their children educated and the rights of

children to be educated, parents have the right to advance these shared interests in court.

To improve the educational opportunities of their children, parents – especially those of children with disabilities – are heavily invested in their children's schooling. Parents also have a constitutional right to control and influence the education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925). Furthermore, Congress has repeatedly recognized the importance of parental involvement and thus given parents outlets for exercising their right even in the context of public education. In practice, primary and secondary education in this country is heavily influenced by parents of schoolchildren, who dominate school boards, comment on curricula, and participate at high rates in all aspects of their children's education. The fact that parents are so involved, and that policymakers see such involvement as crucial to meeting educational goals, highlights the necessarily intertwined nature of the educational rights of parents and children. Given that the rights of parents under the IDEA are shared, parents have third-party standing to litigate the claims they share with their children.

To improve their children's opportunities, parents invest an extraordinary amount of time and energy shaping their children's educations and exercising their legal rights to control the process. Parents of children with disabilities, like the Winkelmans, devote even more time than the average parent educating their children at home and working to develop the details of their individualized education plans. Given this degree of involvement, it is impossible to disentangle the educational rights of children from those shared by their parents, particularly with respect to the families whose rights are protected by the IDEA.

Parents of children with disabilities display exceptionally high levels of involvement in every facet of primary and secondary education. Eighty percent report regularly talking

with their children about school, seventy-six percent help with homework at least once a week, and twenty-one percent provide homework assistance five or more times a week. Lynn Newman, *Research Digest: Family Involvement in the Education of Secondary-School-Age Students With Disabilities*, FINE NETWORK: HARVARD FAMILY RESEARCH PROJECT (2005), http://www.gse.harvard.edu/hfrp/projects/fine/resources/digest/disabilities.html. Nearly all parents of children with disabilities (ninety-three percent) attend school activities, such as back-to-school nights, PTA meetings, conferences, class activities, or volunteering; seventy-seven percent of these parents have attended school meetings, seventy-three percent have attended parent-teacher conferences, and sixty-two percent report attending school or class events. *Id.* They do this not for their own gratification, but to ensure the educational success of their children.

Notably, with respect to the individualized education plans expressly provided by the IDEA, parental participation is striking, with "[n]early 9 out of 10 parents of secondary-school-age students with disabilities (88%) report[ing] participat[ion] in at least one IEP meeting in the current or prior school year." *Id.* Moreover, a majority of families "report being involved in developing IEP goals" and one-third wanted to be "more involved" in decisions about their children's IEP. *Id.* Here, the Winkelmans likewise worked diligently and successfully with Respondent for years as part of Jacob's IEP team prior to the events leading to this suit.

Parents of children with disabilities are even more involved in public education than the very involved average parent. "Compared with their peers in the general population, families of students with disabilities are more involved in monitoring and assisting with homework, and they are as involved, and at times more involved, in school-based activities . . .. Families of students with disabilities also are more likely to attend general school meetings and parent-teacher conferences than those in the general

population." NATIONAL LONGITUDINAL TRANSITION STUDY-2, FAMILY INVOLVEMENT IN THE EDUCATIONAL DEVELOPMENT OF YOUTH WITH DISABILITIES 86 (2005), *available at* http://www.nlts2.org/reports/2005_03/nlts2_report_2005_03_complete.pdf. Specifically, parents of children with disabilities are five times as likely as parents in the general population to help with homework on a regular basis. *Id.* at 24. These levels of involvement are even more striking considering that families of students with disabilities are more likely to have single-parent households, lower family income, and lower parental education levels – all variables typically associated with lower levels of parental involvement. *Id.* at 86.

These numbers are all the more remarkable when viewed in light of the already high average of all parents in primary and secondary education. According to the NCES, the vast majority of parents are engaged in critical aspects of primary and secondary schooling to improve the educational outcomes of their dependent children. NCES, Parental and Family Involvement in Education Report, 2002-03. In 2003, eighty-eight percent of parents attended a general school meeting; seventy-seven percent attended a school or class event; forty-two percent volunteered or served on a school committee; and sixty-two percent participated in school fundraising. *Id.* at 11. Moreover, parents are integrally involved in facilitating the academic success of their children in school and ensuring that their children fully benefit from public education. Of children in kindergarten through twelfth grade, ninety-five percent had parents who reported assisting with homework; eighty-five percent had parents who reported that an adult checked to ensure homework was completed; and ninety percent of students had a place in their homes set aside for doing homework. *Id.* at 19. Furthermore, parents read to their children at least once a week in nine out of ten homes with students in kindergarten through third grade. *Id.* Parents even provide financial

support for their children's public schooling, with seventy-nine percent of parents reporting that they have been asked to fund items and needs – including paper, cleaning supplies, transportation, technology, teacher salaries, and educational curricula – that had previously been covered by school budgets. PTA National Public Opinion Poll on Education Funding, National PTA 2004 Annual Report 12.

To improve their children's educational outcomes, parents not only engage at every level of their children's education, but also dominate school governance. In the United States, almost *all* school board members are parents (ninety-six percent), and about half (48.9%) have children currently in school. Frederick M. Hess, National School Board Association, School Boards at the Dawn of the 21st Century: Conditions and Challenges of District Governance 28 (2002), *available at* http://www.nsba.org/bookreports/SBDawn21stCent.pdf. School districts are governed primarily by parents, not educators: only thirteen percent of school board members report a professional background in education. *Id.* at 26. Moreover, the "vast majority of school boards are financially independent from the general city or county government," leaving parents with complete control over the direction and structure of children's education. *Id.* at 30. In fact, "just 15 percent of boards need the municipal government to approve their budget and just 17 percent need it to approve a proposed bond issue." *Id.* (internal table references omitted).

These exceptionally high levels of parental involvement reflect the fact that parents have always had the legal right to control the education of their child: "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). In *Pierce*, the Court held that "forcing [children] to accept instruction from public teachers only," *id.*, "unreasonably interferes with the liberty of parents and

guardians to direct the upbringing and education of children," *id.* at 534. The IDEA's procedural provisions, *see* 20 U.S.C. § 1415, which are directed specifically toward parents of children with disabilities, build upon this liberty of educational control that is vested in parents under the Constitution. From this baseline of parental control it becomes clear that the IDEA not only accepts the historically intertwined nature of the educational rights of parents and children, but also furthers this relationship by granting parents new procedural avenues through which they may exercise control while enjoying a publicly funded education. Because the IDEA perpetuates and works within this longstanding framework of parental rights, this Court should not attribute to Congress an intent to create an artificial distinction between the educational rights of the children and rights of the parents under the Act.

Recognizing the critical role of parents in the success of the IDEA, Congress also provided for the creation of parent training and information centers to ensure that children "meet developmental and functional goals, and challenging academic achievement goals . . . and [are] prepared to lead productive independent adult lives." 20 U.S.C. § 1471(b)(1). In addition to the IDEA, Congress enacted the Goals 2000: Educate America Act to "provide a framework for meeting the National Education Goals," 20 U.S.C. § 5801, one of which was that "[b]y the year 2000, every school [would] promote partnerships that [would] increase parental involvement and participation in promoting the social, emotional, and academic growth of children," *id.* § 5812(8)(A). Similarly, under the Improving America's Schools Act of 1994, Congress required educational agencies to "implement[] programs, activities, and procedures for the involvement of parents" in order to receive federal educational funds. Pub. L. No. 103-382, § 1118, 108 Stat. 3518, 3550. This condition on the receipt of federal funds was recodified and amended at 20 U.S.C. § 6318 under the

No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1118, 115 Stat. 1425 (2002), which requires states through "separate measurable annual objectives" to ensure "continuous and substantial academic improvement" for all students, including "students with disabilities." *Id.* § 6311(b)(2)(C)(v). To achieve these measurable objectives, Congress recognized the need to ensure that schools "afford[] parents substantial and meaningful opportunities to participate in the education of their children." *Id.* § 6301(12).

School districts across the country recognize the importance of high levels of parental involvement to the success of public education and have established policies to encourage parents to participate. One study found that over ninety percent of surveyed districts in fifteen states reported having at least one formal policy in place to encourage parents to get involved in their child's education. Susan L. Kessler-Sklar & Amy J. L. Baker, *School District Parent Involvement Policies and Programs*, 101 Elem. Sch. J. 101 (2000) (reporting the results of a survey of superintendents of two hundred school districts in fifteen states regarding the adoption of six common types of parent involvement policies). The study found that 79.9% of responding districts had adopted policies to facilitate communication with parents about their child's academic performance and that 73.3% of districts had policies that provided parents with the power to help make decisions about school policies or practices. *Id.* School boards regularly reach out to parents directly. For example, forty-eight percent of districts hold open forums for parents/community members to discuss student achievement goals, Hess, *supra*, at 14; 57.8% provide formal opportunities for community input into the curriculum, *id.* at 15; and 94.3% consider "parental satisfaction" to be important in assessing superintendent performance, *id.* at 23.

Policies and programs in place in school districts across the nation bear out these statistics and demonstrate that

schools recognize the need to have parents involved in the education of their children. Respondent's school board policy, for example, states that "[a]ll parents/guardians of students enrolled in the District are encouraged to take an active role in the education of their children." Parma City Sch. Dist. Bd. Pol'y Manual, No. 2111, *available at* http://www.parmacityschools.org/board/policies/upload/Full Manual.pdf. Similarly, in the Houston Independent School District, parents are considered to be "full partners in a child's education." Houston Indep. Sch. Dist., *Parent Rights and Responsibilities Handbook*, *available at* http://www.houstonisd.org/67806986/images/PRR_Brochure .pdf.

School districts often encourage parents to participate in school board meetings and other community forum events so that parents' voices can be heard in the district-wide policy-making process. In Respondent's district, the school board adopted policies to "authorize and encourage . . . constructive cooperation with parents and community groups." Parma City Sch. Dist. Bd. Pol'y Manual, No. 2132, *available at* http://www.parmacityschools.org/board/policies/upload/Full Manual.pdf. Likewise, the Los Angeles Board of Education "hold[s] semi-annual town hall style forums at school sites to enable citizens to participate in the policy making process, allow greater interaction with parents, and discuss and review timely issues affecting the [school district]." Los Angeles Unified Sch. Dist. Bd. Rules, No. 26, at 12, *available at* http://www.lausd.k12.ca.us/lausd/board/secretary/html/ BoardRules11-1-06.pdf.

Several districts have also established formal advisory committees composed of parent and community representatives who participate in each school's decision making process. For example, the New York School Board established "Community Education Councils," each "consist[ing] of 11 voting members who serve two-year terms, and one non-voting student member who serves a one-

year term." New York City Dep't of Educ., Community Education Councils, *at* http://docs.nycenet.edu/docushare/dsweb/Get/Document-87/D-140.pdf. Of the twelve members on each Council, "[n]ine of the voting members must be parents of children attending a school in the community school district." *Id.* Similarly, the Los Angeles School Board established a "School-Community Council" for each school. Los Angeles Unified Sch. Dist. Bd. Rules, No. 1370, at 81, *available at* http://www.lausd.k12.ca.us/lausd/board/secretary/html/BoardRules11-1-06.pdf. Members of these councils "participate in decision making by advising the principal in matters pertaining to the local school and its educational program," and parents must comprise a majority of members on each council. *Id.* Many districts also grant parents broad rights to control the instructional materials to which their children are exposed. In Respondent's district, school board policy states that "[n]o student shall be required to participate in such activities if they are contrary to the convictions of the student or his/her parents or guardians." Parma City Sch. Dist. Bd. Pol'y Manual, No. 2240, *available at* http://www.parmacityschools.org/board/policies/upload/FullManual.pdf. Parents can review "program lessons and/or [instructional] materials" and "file[] a complaint . . . regarding either the content or activities," stating that they "conflict with his/her religious beliefs or value system." *Id.* "[T]he school will [then] honor a written request for his/her child to be excused from a particular class for [those] specified reasons." *Id.* In Houston, parents similarly have the right "[t]o examine the curriculum materials of the classes in which their children are enrolled." Houston Indep. Sch. Dist., *supra.*

In addition, school districts are increasingly reaching out to parents by offering training in how to effectively get involved in their child's education. In Stockton, California, the school district set up a Parent Resource Center that trains parents to participate in their children's educations. *See*

Adriana Khoo, *Schools That Welcome Parents: How Schools Can Reach Out to Parents and Create Ways for Them to Participate*, Child Advocate, Jan.-Feb. 2001, *available at* http://www.4children.org/news/101sche.htm. Similarly, in San Diego, the school district provides classes designed to prepare parents "to work with school staff to support their children's learning." San Diego Parent University: Parents Helping Children Learn, http://www.sandi.net/parent/parent.univ/who.htm. The Chicago Public School District also provides open workshops for parents on topics such as motivating students, and the "hows and whys" of parent involvement. Chicago Public Schools Parent Community Partnership Workshops, http://www.cps.k12.il.us/Parent/PCP/programs.html#workshops. The widespread adoption of these policies and programs demonstrates that school districts acknowledge that parents have a right to guide the education of their children and highlights that educational rights are shared.

Given that parent-run school boards establish curricula, hire faculty, facilitate student achievement, direct funding, and provide special education, it makes little sense to speak of a child's right to a public education independent of her parents' shared rights. Parents are embedded in primary and secondary schooling in this country to such an extent that Congress could not have meant to provide dependent children with a right to a free appropriate public education, while excluding parents from sharing in that basic right. Because the Winkelmans and their son Jacob share the right to a free and appropriate public education, they have standing to advance their challenges against Respondent's proposed IEP.

III. Parents Receiving Specialized Training in IDEA Have Proven to Be Powerful, Effective and Successful Advocates for Their Children's Rights to an Appropriate Public Education.

Throughout the country, state and local agencies similar *to* amicus Ohio Coalition regularly conduct in-depth training programs for parents of children with disabilities, including the estimated 6500 school-age children with autism in Ohio alone, to familiarize parents with the rights and responsibilities pertaining to them and their children, and with the processes, resources, and remedies available to them under IDEA.

The Ohio Coalition directly serves over 31,000 parents among fourteen federal disability categories on an annual basis. In 2005, the most recent year for which data are available, its two Parent Training and Information Projects provided training to over 2500 parents on IDEA specifically and to an additional 4100 parents on more specialized topics.

In 2005, the Ohio Coalition disseminated information to over 715,000 parents, professionals, and members of the public regarding disability issues. In addition, the Project trains parents on IDEA's requirements and processes throughout all eighty-eight counties and 613 school districts in Ohio and services twenty other parent centers in nine Midwest states. Parents receive detailed instruction and training to understand the importance of early intervention, evaluation and implementation of IEPs, to build their knowledge base in IDEA and the rights and procedures it provides, and to learn to advocate effectively on behalf of their children.

ASO complements the eight local chapters of the Autism Society of America in Ohio in providing parent support groups and local training for parents. ASO also sponsors a biannual conference that includes training in parent advocacy.

As a result of such training programs, the experience of agencies like the Ohio Coalition and ASO is that parents who receive such training have become informed, powerful, and effective representatives, and have been overwhelmingly successful in advocating to ensure that the requirements of

IDEA are being followed and that appropriate special educational services are being provided for the benefit of their disabled sons and daughters. Indeed, because of the specialized knowledge such parents acquire, they are usually better able to represent their children's interests and rights under IDEA in dealing with school officials than professional advocates such as attorneys.

The experience of these agencies demonstrates that parents who receive such in-depth training should be just as effective and successful in advocating for rights under IDEA in federal court litigation as in communications with school officials or due process hearings with state education agencies that display certain of the attributes and formalities of litigation. There is no evidence in the data or supported by the experience of these agencies that parents as a group would be less efficient or effective in litigating under IDEA than other *pro se* litigants in federal court. To the contrary, parents who have received training to act as advocates for their children's rights in other settings should be expected to be extraordinarily powerful, effective, and successful *pro se* litigants in this context. It makes no sense to allow *pro se* litigation in the one context and not in the other – particularly when the education of children with disabilities is implicated.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
(Counsel of Record)
AKIN, GUMP, STRAUSS,
HAUER, & FELD, L.L.P.
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl., NW
Washington, DC 20016

Eric H. Zagrans
ZAGRANS GUFFEY LLC
1401 Eye Street, NW, 7th Floor
Washington, DC 20005

December 15, 2006